397

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 47.

MARY PHELPS MONTGOMERY, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES B. MONTGOMERY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE CITY OF PORTLAND AND THE PORT OF PORTLAND.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED FEBRUARY 16, 1901.

(18,054.)

(18,054.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 253.

MARY PHELPS MONTGOMERY, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES B. MONTGOMERY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE CITY OF PORTLAND AND THE PORT OF PORTLAND.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from the circuit court of Multnomah county	2	1
Motion to strike out portions of answer	3	1
Order denying injunction and overruling demurrer	5	3
Decree	6	4
Findings of fact	7	4
Conclusions of law	20	14
Clerk's certificate	23	15
Appellants' abstract of record	24	15
Complaint	25	16
Answer	34	21
Exhibit B—Certificate to map	51	30
Moton to strike out portions of answer	51	31
Demurrer to answer	53	32
Findings of fact	54	33
Conclusions of law	72	42
Decree	73	43

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 12, 1901.

	Original.	Print
Assignment of errors	74	44
Stipulation as to abstract of record	75	44
Brief for appellants	76	45
Brief for respondent	109	62
Reply brief for appellants	318	158
Decree	335	167
Opinion	338	169
Petition for writ of error	351	176
Bond on writ of error	362	182
Citation	366	184
Assignment of errors	369	185
Writ of error	375	188
Clerk's certificate	379	190
Stipulation in reference to transcript and papers for Supreme Court of the United States	381	191

In the Supreme Court of the State of Oregon.

THE CITY OF PORTLAND ET AL., Plaintiffs & Appellants,
vs.
JAMES B. MONTGOMERY, Defendant & Respondent.

Transcript.

THE CITY OF PORTLAND ET AL., Plaintiffs & Appellants,
vs.
JAMES B. MONTGOMERY, Defendant & Respondent.

ppeal from the circuit court of Multnomah county, Honorable John B. Cleland, judge.

Williams, Wood & Linthicum & J. M. Long, attorneys for ap-llant.
Stout, Boise and Stott and Mitchell and Tanner, attorneys for spondent.

Index.

otion .....
rder.....
ecree.....

Filed Mar. 4, 1899.

J. J. MURPHY, *Clerk*,
By W. P. WILLIAMS, *Deputy*.

In the Circuit Court of the State of Oregon for the County of Multnomah.

HE CITY OF PORTLAND and THE PORT of Portland, Plaintiffs,
vs.
JAMES B. MONTGOMERY, Defendant.

Motion to Strike Out Portions of Answer.

Now come the above-named plaintiffs and move to strike out from e answer of the above-named defendant the clauses hereinafter signated, upon the grounds that the same are irrelevant and immaterial:

I.

All that part of subdivision IV of said answer commencing with e word "but" in line 18 of page 3 and ending with the word roid" in line 29 of the same page.

II.

All that part of subdivision V of said answer commencing with e word "but" in line 7 of page 4, and ending with the word ity" in line 21 of the same page.

III.

All that part of subdivision VII of said answer commencing with the word "but" in line 30 of page 5 and ending with the word "void" in line 5 of page 6.

IV.

All of subdivision VIII of said answer commencing with the word "defendant" in line 8 and ending with the word "river" in line 14 of page 6.

V.

All that part of subdivision IX of said answer commencing with the word "and" in line 28 of page 6, and ending with the word "Congress" in line 7 of page 6½.

4 VI.

All of subdivision X of said answer commencing with the word "this" in line 10 of page 6½ and ending with the word "Portland" in line 8 of page 6¾.

VII.

Also all that part of said answer between the word "and" in line 7 of page 8 and the words "Exhibit A" in line 22 of the same page.

VIII.

Also all that part of said answer between the word "defendant" in line 21 of page 11 and the word "aforesaid" in line 32 of the same page.

IX.

Also all that part of said answer commencing with the word "defendant" in line 33 on page 11 and ending with the word "well" in line 9 of page 12.

X.

Also all that part of said answer commencing with the word "defendant" in line 10 and ending with the word "water" in line 21 of page 12.

XI.

Also all that part of said answer commencing with the word "defendant" in line 22 of page 12 and ending with the word "shippers" in line 27 of the same page.

XII.

Also all that part of said answer commencing with the word "defendant" in line 28 of page 12 and ending with the word "Portland" in line 24 of page 13 of said answer.

XIII.

Also all that part of said answer commencing with the word "and" in line 5 of page 14 and ending with the word "river" in line 24 of page 14.

WILLIAMS, WOOD & LINTHICUM AND
J. M. LONG, *City Attorney*,
Attorneys for Plaintiff.

5 Due service of the within motion by certified copy as prescribed by law, is hereby admitted at Portland, Oregon, Dec. 10th, 1898.

MITCHELL & TANNER,
Attorneys for Defendant.

Endorsement: No. A 3886. In the circuit court of the State of Oregon for the county of Multnomah department No. 3. The City of Portland and The Port of Portland, plaintiffs, *vs.* James B. Montgomery, defendant. Motion to strike out portions of answer. Filed Dec. 10th, 1898. Dan. J. Moore clerk by Lansing Stout deputy. Williams, Wood & Linthicum, attorneys for plaintiff.

Be it remembered that at a regular term of the circuit court of the State of Oregon, for the county of Multnomah, begun and held at the county court-house in the city of Portland, in said county and State, on Monday the 9th day of January, A. D. 1899, the same being the 2nd Monday in said month, and the time fixed by law for holding a regular term of said court; present Hon. John B. Cleland, judge, presiding in department number three. Whereupon, on this Monday the 16th day of January, A. D. 1899, the same being the 7th judicial day of said term of said court, among other proceedings the following was had, to wit:

CITY OF PORTLAND ET AL., Plaintiffs,
vs.
J. B. MONTGOMERY, Defendant. } A 3886.

At this time, the court being now fully advised on the application for a temporary injunction herein, it is ordered by the court that the same be and hereby is denied and the restraining order dissolved and the court being fully advised on the motion to strike out parts of and demurrer to answer,

6 It is ordered that the motion be and the same is hereby denied and the demurrer be and the same is hereby overruled.

(Signed) JOHN B. CLELAND, *Judge.*

Be it remembered that at a regular term of the circuit court of the State of Oregon, for the county of Multnomah, begun and held at the county court-house in the city of Portland, in said county and State, on Monday the 9th day of January A. D. 1899, the same

being the 2nd Monday in said month, and the time fixed by law for holding a regular term of said court, present, Hon. John B. Cleland, judge, presiding in department number three, whereupon on this Saturday the 11th day of February A. D. 1899, the same being the 30th judicial day of said term of said court, among other proceedings the following was had, to wit:

In the Circuit Court of the State of Oregon for the County of Multnomah.

THE CITY OF PORTLAND and THE PORT OF Portland, Plaintiffs,
vs.
JAMES B. MONTGOMERY, Defendant.
} Decree. A 3886.

This cause having come on regularly for trial on the merits on the — day of ——, 1899, the plaintiffs, The City of Portland and The Port of Portland appearing by George H. Williams, their attorney, and the defendant James B. Montgomery appearing by Stott, Boise & Stout and Mitchell & Tanner his attorneys, and the court having heard the testimony of the respective parties and the argument of counsel, and being fully advised in the premises, made and filed herein findings of fact and conclusions of law, as follows, to wit:

7 *Findings of Fact.*

1st. That the plaintiff, The City of Portland is a municipal corporation, duly incorporated by the legislature of the State of Oregon; that among other powers conferred upon the common council of said city of Portland, the charter of said city provides as follows: "To regulate the building of wharves and the driving of piles in the Willamette river, within the limits of the city, and to establish a line beyond which wharves shall not be built, nor piles be driven," and that said provision has been since February 19th, 1891, and is now in full force and effect.

2nd. That on the 9th day of August, 1892, the Secretary of War of the United States, in pursuance of the authority conferred on him by the twelfth section of an act of Congress known as the river and harbor act and entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes" passed September 19th, 1890 (Supplement to the Revised Statutes of the United States, pages 800--803), caused harbor lines to be established in the Willamette river within the limits of the city of Portland and that such harbor lines are the same lines described in subdivision three of the bill of complaint herein as "wharf lines."

3rd. That on the 12th day of December, 1892, the common council of the city of Portland adopted an ordinance numbered 7995, entitled "An ordinance establishing a wharf line on the city front," and by which the common council of the city of Portland adopted,

in so far as it had any power in the premises, as the wharf lines of the city the harbor lines established by the Secretary of War, as set out in the second of these findings of fact herein; that section three of said ordinance provides as follows:

8 "All wharves or other structures hereafter built or erected on the river front of the city on the east side of the Willamette river, shall not extend westerly beyond the line as laid down in section one of this ordinance and all permits hereafter granted by the common council for the driving of piles or erection of structures shall conform to said line."

4th. That on the 18th day of February, 1891, the Legislative Assembly of the State of Oregon passed an act, entitled "An act to establish and incorporate the Port of Portland and to provide for the improvement of the Willamette and Columbia rivers in said port and between said port and the sea."

That sections 1, 2, 3, and 9 of said act are as follows:

"SEC. 1. That all that part of Multnomah county in this State which lies west of the east boundary line of range two east of the Willamette meridian and south of the north boundary line of township one north of the base line, be and and the same is hereby created a separate district to be known as the Port of Portland, and the inhabitants thereof are hereby constituted and declared to be a corporation by the name and style of the Port of Portland, and as such shall have perpetual succession and by the said name shall exercise and carry out all the corporate powers and objects hereby conferred and declared, make all contracts, hold, receive, and dispose of real and personal property, such as may be found requisite, necessary, or convenient in carrying out the objects of said corporation as herein set out and expressed, and sue and be sued, plead and be impleaded in all actions, suits and proceedings brought by or against it."

Section 2 of said act is as follows:

"SEC. 2. The object, purpose, and occupation of said corporation, the Port of Portland shall be to so improve the Willamette river at the cities of Portland, East Portland, and Albina and the Willamette and Columbia rivers between said cities and the sea as that there shall be made and permanently maintained in said Willamette river at said cities and in the said Willamette and Columbia rivers between said cities and the sea, a ship channel of good

9 and sufficient width and having a depth at all points at mean low water both at said cities and between said cities and the sea, of not less than twenty-five feet."

Section 3 of said act provides among other things as follows:

"SEC. 3. So far as is necessary, requisite, or convenient to carry out the said object, the said corporation shall have the full control of said rivers at said cities and between said cities and the sea, so far and to the full extent that this State can grant the same, and shall be and is hereby authorized to remove such obstructions therefrom and erect such works therein as may be found necessary or convenient in creating and maintaining the channel as aforesaid, and in section 2 hereof provided for."

Section 9 of said act provides that the power and authority given to said corporation, the Port of Portland, by said act shall be vested in and exercised by a board of commissioners, which board of commissioners was, prior to the commencement of any proceedings connected with this suit, duly appointed and organized by the election of a president, vice-president, treasurer and secretary, as provided for in said act.

That soon after the passage of said act incorporating the Port of Portland, a copy of the same was transmitted by the president of said Port of Portland to the then Secretary of War, who approved the same and that the work of the said Port of Portland in improving the Columbia and Willamette rivers has been conducted in conjunction with the United States engineers in charge of said rivers acting under instructions from the Secretary of War and said engineers have annually reported to said Secretary the nature and extent of said work by said Port of Portland. But there is no evidence in the case showing or tending to show that any dredging or other work of any kind whatever in the improvement of said Willamette river has ever been done by the said Port of Portland, on the inside or land side of the harbor line as relocated by the Secretary of War, September 23rd 1898, or in the vicinity thereof, either above or below the same, nor that the Secretary of War has at any time suggested or recommended any such dredging or widening of the channel in that locality.

5th. That that portion of the harbor lines so caused to be established as aforesaid by the Secretary of War on the 9th day of August, 1892, on the east side of said harbor in the Willamette river within the city limits of the city of Portland, for a distance at and along and for some distance above and below where the defendant James B. Montgomery is constructing his wharf, as hereinafter referred to in this finding of fact, and as in the bill of complaint alleged, on a line as designated and marked "Harbor line approved by the Secretary of War August 9, 1892" on a map or plat of the United States Government engineers, certified to August 23, 1898, by W. L. Fisk, major corps engineers U. S. A. and entitled, "Harbor line, Portland, Oregon, Randolph street to Russell street, surveyed August 6-13, 1898" and which map or plat also contains the following: "War Department, September 23, 1898. The change in the harbor line shown in red herein is approved, G. D. Meiklejohn, acting Secretary of War," and which map is marked "Exhibit A" and made a part of the answer of the defendant James B. Montgomery herein, and which harbor line is so laid out and represented on said map "Exhibit A," is a part of the same line referred to in the bill of complaint and therein averred as having been established "by the U. S. engineers, August 9th, 1892."

That the defendant James B. Montgomery was at the time of the commencement of this suit and still is the owner of the land fronting on the Willamette river, and of whatever riparian rights attach thereto for the whole distance of the line in controversy in this suit.

6th. That on or about May 21st, 1898, the defendant James B. Montgomery presented his petition to the Secretary of War in which he

claimed that said harbor line, established August 9th, 1892, in front of water lots one, two, three, four, five, six, and seven, was located too far inland and at many points in water only six inches to two feet in depth and praying that said line in front of said lots and for the distance as hereinafter particularly described, should be relocated;

11 that the Secretary of War on receipt of said application of the defendant Montgomery directed that a public hearing be had on the subject before Major W. L. Fisk, major corps of engineers, U. S. A. at Portland, Oregon, with a view of ascertaining whether such change in said harbor lines as prayed for by defendant and whether his prayer for permission to extend his wharf beyond the harbor line established August 9, 1892 should be granted; that such public hearing was had by Major Fisk on August 5th, 1898, and pending which the petition of the defendant Montgomery was on the 17th day of August, 1898 amended by him at the written request of Major W. L. Fisk major corps engineers, U. S. A. so as to more definitely describe the change in the harbor line asked for, which amendment was embodied in a communication from the defendant James B. Montgomery, of which the following is a copy:

"PORTLAND, OREGON, *Aug.* 17, 1898.

To Maj. W. L. Fisk, corps engineers, in charge river & harbor improvements, etc.

DEAR SIR: In reply to your letter asking for a definite location of the change in the established wharf line in front of my property in Albina as desired by me, I would state as follows, viz:

I respectfully ask that the established wharf line be relocated according to the following description:

'The prolongation northward of the present established wharf line, from the center line (produced) of Knight street, to the center line (produced) of Randolph street, to an intersection of a prolongation southward of the present established wharf line along the face of the Northern Pacific Terminal Company's dock or wharf, from the intersection of said line with the center line of Russell street (produced).'

Very respectfully yours, J. B. MONTGOMERY."

In such amendment the defendant Montgomery defined the change prayed for substantially as follows, and as now indicated on

12 said map "Exhibit A" to the answer by a red line formed as follows: "By the extension to an intersection in front of the property of the defendant between Essex and Marion streets of the harbor lines established by the Secretary of War August 9th, 1892, in front of the present "Montgomery dock" as designated on said map "Exhibit A," and in front of the Northern Pacific Terminal Co.'s dock as designated on said map "Exhibit A," and which red line is designated on said map as follows: "Change desired by J. B. Montgomery, per his letter of August 17th, 1898."

And to which hearing the public were invited, and at which were a number of the leading business men of the city of Portland interest- in the preservation and protection of the harbor of Port-

land, and whose views and opinions and protests were received in writing by Major Fisk and all of which with his reports were forwarded to the Chief of Engineers of the War Department, the report of Major Fisk being adverse to such change.

7th. That subsequently on September 1st, 1898, John M. Wilson, brigadier general, Chief of Engineers U. S. Army, transmitted to the Secretary of War the papers in the case including a map showing the harbor line established by the Secretary of War on August 9th, 1892, and also the line claimed by Mr. Montgomery and on which he claimed said harbor line should be relocated, a copy of which map is "Exhibit A" attached to the answer herein, accompanied by his report of which the following is a copy:

"8th indorsement.

OFFICE OF CHIEF OF ENGINEERS,
U. S. ARMY, *Sept.* 1, 1898.

Respectfully returned to the Secretary of War.

This is a case of an application of Mr. J. B. Montgomery of Portland, Oregon, for a change of the harbor lines at Portland from those ordered by the Secretary of War August 9, 1892, so as to admit of the construction of a dock, the outer limit of the extreme point of which will be about 85 feet in advance of the present harbor line.

The object of Mr. Montgomery, as stated by him, is to avoid the necessity of the expense of dredging about 22,000 cubic yards of hard material.

If the request is granted it will withdraw a little more
13 than one acre of the harbor room of Portland, Oregon, and will add about two-thirds of an acre to Mr. Montgomery's dock property.

A public hearing upon this subject was held by Major W. L. Fisk corps of engineers, in Portland, on August 5, 1898, at which a number of prominent citizens were present and views were expressed in favor and against granting Mr. Montgomery's request. A number of letters advocating and opposing the change in the harbor lines were presented and are submitted herewith. After a careful consideration of all the facts, Major Fisk sums up the objections of those opposing the change requested by Mr. Montgomery and expresses the opinion that the harbor lines should remain as established by the Secretary of War in 1892.

The objections presented are as follows:

'1st. The projecting angle in the proposed new harbor line would be likely to cause deposits below it, because it would necessarily check the current at that point during high water, the time at which sediment is carried.'

I do not concur in the point made in this objection. On the contrary I believe the slight contraction suggested would correspondingly increase the current and scouring force at the locality.

'2nd. The reduction of the high-water cross-section by the pro-

posed change would have a slight choking effect on the floods, not of great importance however.'

In my opinion the choking effect, if any, would be immaterial.

'3rd. The reduction of the harbor area is the important objection as it is in this portion of the river that sea-going vessels anchor before docking and after loading and are obliged to maneuver both arriving and departing, and no encroachment upon the already limited harbor area should be permitted in view of the rapidly increasing commerce of this port.'

This objection should receive thoughtful consideration the change if authorized will withdraw something over an acre from the surface area but the present depth varies from one to fourteen feet, the greater portion showing less than eight feet over what is re-
14 ported as hard material; it is now available for anchorage for light-draft vessels only, but can be deepened by dredging.

'4th. As to give Mr. Montgomery privileges which others have not asked through a jealous care for the best interests of the port and even at considerable expense to themselves it hardly seems fair, although the dredging at the place under discussion would probably be in a material harder than in most other localities.'

The point made that if this is granted it will be a special privilege not requested by others, is hardly a good one; if others had made similar applications they surely would have expected and demanded courteous consideration of their requests.

'5th. The increase in the area of Mr. Montgomery's wharf brings up the point that if one holder of water-front property is allowed such substantial advantages, others might justly advance similar claims.'

This point is important and should be carefully considered; if other parties presented similar requests under similar conditions they would receive prompt consideration; in this specific case the owner finds the harbor line running across a bed of hard material which has defied the erosive power of current during freshets; to avoid the expense of removing about 22,000 cubic yards, he asks that the harbor line be thrown forward about 85 feet at one point, running back to its original location at points about 700 feet distant on each side; to comply with his request reduces the distance between harbor lines on opposite side of the river to about 1,000 feet; less than a mile above the river is only 600 feet wide and is spanned by a bridge resting on piers; the slight contraction now asked cannot throttle the freshets or do any material damage.

In an engineering point of view and in the immediate *of* future interests of commerce, I cannot believe that any material damage will result from granting this request.

The application of Mr. Montgomery is backed by such citizens as Mr. Henry Failing, Senator McBride who writes in his own name and that of Representatives Ellis and Tongue, Mr. Raleigh
15 Stott, Mr. W. F. Burrell, Messrs. C. H. and D. Rafferty, Messrs. Inman, Poulsen & Co., Wells Fargo & Co. (by Mr. R. M. Dooley) and Mr. J. M. Strowbridge, Mr. A. L. Mohler, president of the Oregon Railway and Navigation Company incloses a letter from

the chief engineer of the company, who states he can see no objection whatever to granting Mr. Montgomery's request.

The request receives strong opposition from the Portland chamber of commerce through Mr. H. R. Lewis, secretary, Mr. L. A. Lewis in behalf of Mrs. C. F. Lewis, from Mr. A. F. Wheeler, from Mr. C. E. Ladd, executor of the estate of the late W. S. Ladd; from the Pacific Coast Elevator Company, and from a number of citizens including the firm of Allen & Lewis by L. A. Lewis, Mr. J. McCracken and others who have signed a protest *changing* (against) changing the harbor lines.

After a careful study of the subject, I see no objection to granting this request other than the establishment of a precedent upon which other applications may hereafter be based; this, in my opinion, is an important objection for the consideration of the Secretary of War.

Mr. Montgomery requests that the Secretary of War will not take final action in this matter until he can have an opportunity to be heard before him.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army."

And subsequently on September 23rd, 1898, G. D. Meiklejohn, acting Secretary of War, took act- thereon, by the following endorsement of the papers in the case:

"9th Endorsement.

WAR DEPARTMENT, *September 23rd*, 1898.

In accordance with the views of the Chief of Engineers the request of Mr. James B. Montgomery will be complied with.

G. D. MEIKLEJOHN,
Acting Secretary of War."

And also on the same day making the following endorsement upon the said map hereinbefore described, and a copy of which is "Exhibit A" attached to the answer herein:

16 "WAR DEPARTMENT, *September* 23, 1898.

The change in the harbor line shown in red hereon is approved.

G. D. MEIKLEJOHN,
Acting Secretary of War."

The court finds that the red line referred to in the foregoing statement of the acting Secretary of War is the identical line described in the application of the defendant Montgomery for the change of the harbor line, as amended by him at the request of Major Fisk, corps engineers, U. S. A., August 17th, 1898.

8th. That by the action of the acting Secretary of War of September 23rd, 1898, aforesaid, the said harbor line was re-established and relocated by the Secretary of War, between Randolph and Russell streets extended, on a line formed by an extension to an intersection in front of the defendant Montgomery's said property of the

harbor line established August 9th, 1892, in front of the present "Montgomery dock" and in front of the "Northern Pacific Terminal Co.'s dock" as designated and described on said map "Exhibit A" and by the red line thereon, that being the identical line described in the application of defendant Montgomery as amended August 17, 1898, in response to the written request of Maj. W. L. Fisk, major corps engineers U. S. A. as aforesaid.

9th. That prior to the commencement of this suit, but subsequent to September 23rd, 1898, the defendant James B. Montgomery, began the construction of a wharf by the driving of piles partly outside of the harbor line established by the Secretary of War August 9th, 1892, but wholly inside of the line as relocated by the Secretary of War September 23, 1898, and as described by said red line on said map "Exhibit A" attached to the answer herein.

10th. That on or about the 2nd day of November, 1898, the board of commissioners of the port of Portland, at a meeting duly called and held, adopted the following preamble and resolution:

"Whereas the wharf line heretofore and prior to the 1st day of July, 1898, established by the United States engineers, cur-
17 tails the navigable waters of the Willamette river at the city of Portland to the full extent which may be done in the interest of the shipping interests of this port, and

"Whereas in order to provide sufficient space and width of channel to accommodate the fast-increasing shipping interests of this port it will be necessary to, in the near future, so improve the channel of the said river at Portland and within the limits of this port as to make it twenty-five feet in depth within the entire limits of said port, and from the steel bridge crossing said river in the city of Portland, now used by the various railroads entering the said city of Portland, to the south end of Swan island and to its full width as between said wharf lines so established as aforesaid, and

"Whereas to allow any wharves to be extended into said river in this port and within the limits of the city of Portland, beyond the wharf line aforesaid, will be of great and lasting damage to this port and the shipping interests thereof,

"Now, therefore, be it resolved: That the wharf line of this port and at the city of Portland, and on both sides of the Willamette river be and the same is hereby established and fixed as the same as that heretofore and prior to the 1st day of July, 1898, established by the United States engineers, until the further action of this port.

"Whereas, one J. B. Montgomery, those in his employ or acting under him, is now engaged in or intends to construct a wharf on property owned by him, situate in what was at one time the city of Albina, and extending beyond said wharf line.

"Therefore, be it resolved: That the said J. B. Montgomery and those acting under him, be notified to cease the construction of said wharf beyond said wharf line aforesaid, and to at once remove any piling or other obstruction which he may have placed in the river in front of his said property and beyond said wharf line, and that

if he shall fail to do so at once, that the executive committee be instructed to take such steps as may be necessary, by legal proceedings or otherwise, to secure the object aforesaid."

18 That prior to the commencement of this suit and on or about the 3rd day of November, 1898, a copy of said preamble and resolutions was served upon the defendant James B. Montgomery, and also upon the person having charge of the work in the construction of said wharf, accompanied by a communication of which the following is a copy:

"SIR: You and each of you are hereby notified that the Port of Portland, at a meeting duly and regularly held on Wednesday the 2nd day of November, 1898, passed the resolutions herewith, and that you were thereby and are required to cease driving any piles or placing any obstructions of any kind in the Willamette river beyond the wharf line established by the United States engineers prior to July 1st, 1898, in front of the property owned by J. B. Montgomery and situate in what was formerly known as the city of Albina and on which he is now constructing or causing to be constructed a wharf, and that you are required to remove from said river any piling or other obstruction from said river in front of said property and beyond said wharf line which you may have previously placed therein.

By order of the Port of Portland,

J. McCRAKEN, *President.*
J. A. BROWN, *Secretary.*"

11th. That on or about the 23rd day of November, 1898, at a meeting of the board of commissioners of the Port of Portland, duly called and held, the following resolution was passed:

"Whereas on the 9th day of August, 1892, the United States engineers established a wharf line in the Willamette river within the city of Portland, Oregon, and

Whereas, said wharf line has been adopted and established for said city and also by the Port of Portland, and

Whereas, J. B. Montgomery is now engaged in the construction of a wharf in said river outside of said line:

Therefore be it resolved by the board of commissioners of the Port of Portland, That in our judgment, and we do hereby

19 declare and decide that the observance of said wharf line in the construction of wharves is necessary for a good and sufficient width of channel in said river within said city, and that the construction of said wharf which said Montgomery proposes to extend eighty-five feet into said river beyond said wharf line, will be an obstruction to our work in making and maintaining said width of channel: And, further, it is our judgment that said wharf when constructed as proposed by said Montgomery, will interfere with the navigation of said river by creating shoal places in its now navigable waters and will interfere with and obstruct our work in making and maintaining a channel in said river twenty-five feet in depth, as provided for in the act incorporating the Port of Portland."

12th. That ordinance numbered 9071 of the city of Portland, provides as follows:

"Vessels arriving within the corporate limits of the city of Portland, if obliged to anchor, shall be anchored below the Albina ferry and on the west side of the main ship channel."

13th. That the Willamette river is within the limits of the city of Portland, a river wholly within the State of Oregon, and is within and below said city and connecting with the Pacific ocean, navigable for ocean vessels and is one of the navigable waterways of the United States within the meaning of those terms as used in the said act of September 19, 1890, known as the river and harbor act and hereinbefore set out and referred to in the second finding herein and that the tide ebbs and flows in said river within the limits of the said city of Portland.

14th. That the harbor of the city of Portland belongs to that class of harbors in the navigable waters of the United States referred to in section 12 of the act of Congress of September 19, 1890 aforesaid, and in which the Secretary of War was, by said act of Congress authorized to cause the establishment of harbor lines.

15th. That the defendant James B. Montgomery has not driven any piles or placed any obstruction whatever in said river, outside of the harbor lines as relocated and established by the Secretary of War on the 23rd day of September, 1898, as described by said red line on said map "Exhibit A" attached to answer herein, but has, since September 23rd, 1898, driven piles in part construction of his wharf outside of the harbor line as established by the Secretary of War on August 9th, 1892, and all in front of real estate fronting on said Willamette river of which he was and is the owner.

16th. That on October 7th, 1898, the defendant James B. Montgomery was officially notified by W. L. Fisk, major corps engineers, U. S. A. of the relocation of the harbor line in the harbor of Portland, Oregon, as requested by him in his petition of May 21st, 1898, by a communication of which the following is a copy:

"United States engineers' office.

PORTLAND, OREGON, *October* 7, 1898.

Mr. J. B. Montgomery, city.

SIR: I am requested by the Chief of Engineers to advise you that the relocation of the wharf line in the harbor of Portland, Oregon, requested in your petition dated May 21st, 1898, namely, the extension to an intersection in front of your property, of the harbor lines heretofore established in front of the present 'Montgomery dock' and in front of the 'Northern Pacific Terminal Co.'s dock,' has been approved by the War Department.

Very respectfully,

W. L. FISK,

Major Corps Engineers, U. S. A."

Conclusions of Law.

As conclusions of law from the foregoing findings of fact, the court holds:

1st. That the harbor line as caused to be re-established and re-
located by the Secretary of War on the 23rd day of Septem-
21 ber, 1898, in the city of Portland, county of Multnomah, and
State of Oregon, in front of the property owned by the defendant James B. Montgomery and as indicated by the red line on the map "Exhibit A" attached to the answer herein, which line is designated and described to be a line formed by an extension to an intersection in front of the defendant Montgomery's said property of the harbor line established August 9, 1892, in front of the present "Montgomery dock" and in front of the "Northern Pacific Terminal Co.'s dock," was legally so established on September 23rd, 1898, and is the only proper or legal harbor line at said point in said harbor.

2nd. That the defendant James B. Montgomery in driving piles and in constructing his wharf outside of and beyond the harbor line caused to be established by the Secretary of War on the 9th day of August, 1892, and inside of such harbor line as caused to be relocated and re-established by the Secretary of War on the 23rd day of September, 1898, does not in any manner or in any respect unlawfully interfere with the navigable waters of the Willamette river, or with the harbor of the Port of Portland, or with the navigation or other use of either thereof for the purposes of navigation and commerce, nor does the same in any manner or to any extent interfere with any lawful right upon the part of either the Port of Portland or the City of Portland to improve the navigation of said river and harbor.

3rd. That neither the Port of Portland nor the City of Portland has any right to complain of the action of the defendant James B. Montgomery in driving piles and constructing his wharf outside of and beyond the harbor line caused to be established by the Secretary of War on the 9th day of August, 1892, and inside of the harbor line so relocated and re-established by the Secretary of War on the 23rd day of September, 1898, and that neither The City of Portland nor The Port of Portland, plaintiffs herein, has any jurisdiction or right to restrain the construction thereof or to establish any harbor or wharf lines which in any manner conflict with the said harbor line so caused to be relocated and re-established by the Secretary of
War on September 23rd, 1898, as aforesaid.

22 4th. That the complaint of the plaintiffs herein be dismissed and that the defendant have judgment and decree against the plaintiffs for his costs and disbursements to be taxed.

——— ———, *Judge.*

Therefore, in accordance with the foregoing findings of fact and conclusions of law, it is ordered, adjudged, and decreed by the court that the bill of complaint of the plaintiffs filed herein by the City

of Portland and the Port of Portland, be and the same is hereby dismissed, and that the defendant James B. Montgomery have and recover of and from the plaintiffs his costs and disbursements taxed at $— and that execution issue therefor.

(Signed) JOHN B. CLELAND, *Judge.*

Endorsed: In the circuit court of the State of Oregon for Multnomah county. The City of Portland and The Port of Portland, plaintiffs, *vs.* James B. Montgomery defendant. Decree. 131–434.

23 STATE OF OREGON, } ss:
County of Multnomah, }

I, Dan. J. Moore, clerk of the circuit court of the county of Multnomah and State of Oregon, do hereby certify that the foregoing copies of motion, order, and decree have been compared by me with the originals, and that they are correct transcripts therefrom and of the whole of such original papers as the same appear on file and of record in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 3rd day of March, A. D. 1899.

[CIRCUIT COURT SEAL.] DAN. J. MOORE,
Clerk of Circuit Court.

NOTE.—Appeal bond filed February 25th, 1899, with Charles E. Ladd as surety.

DAN. J. MOORE, *Clerk.*

24 In the Supreme Court of the State of Oregon, October Term, 1898.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
v.
J. B. MONTGOMERY, Defendant and Respondent.

Appeal from the judgment of the circuit court for Multnomah county, Hon. John B. Cleland, judge.

Appellant's Abstract of Record.

Williams, Wood & Linthicum and J. M. Long, attorneys for appellants.

Stott, Boise & Stout and Mitchell & Tanner, attorneys for respondent.

Filed Mar. 4, 1899.

J. J. MURPHY, *Clerk.*

25 In the Supreme Court of the State of Oregon, October Term, 1898.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
v.
J. B. MONTGOMERY, Defendant and Respondent.

Appellant's Abstract of Record.

On the 25th day of November, 1898, the plaintiffs filed in the circuit court for Multnomah county a complaint, of which the following is a copy:

Now come the above-named plaintiffs and for cause of suit against the above-named defendant allege as follows:

I.

The City of Portland is a municipal corporation in the State of Oregon, incorporated and existing by and under the laws of said State.

26 II.

The charter of said City of Portland, among other powers thereby conferred upon the common council of said city, provides that said common council of said city "shall have power to regulate the building of wharves and the driving of piles in the Willamette and Columbia rivers within the limits of said city, and to establish a line beyond which wharves shall not be built or piles driven;" and said provision has been, since February 19, 1891, and is now, in full force and effect.

III.

On the ninth day of August, 1892, the United States engineers established wharf lines in the Willamette river within said city of Portland.

IV.

That by section 1 of an ordinance of the common council of said City of Portland, duly passed and approved on the 12th day of December, 1892 (ordinance No. 7995), entitled "An ordinance establishing a wharf line on the city front," the wharf lines of the Willamette river within said city of Portland were established in conformity to and coincident with the wharf lines established by said United States engineers, as aforesaid, which said wharf lines are now in full force and effect.

Section 3 of said ordinance provides as follows:

"All wharves or other structures hereafter built or erected on the river front of the city on the east side of the Willamette river shall not extend westerly beyond the line as laid down in section one (1) of this ordinance, and all permits hereafter granted by the common

council for the driving of piles or erection of structures shall conform to said line."

27 V

On the 18th day of February, 1891, the Legislative Assembly of the State of Oregon passed an act entitled "An act to establish and incorporate the Port of Portland, and to provide for the improvement of the Willamette and Columbia rivers, in said port, and between said port and the sea."

Section 1 of said act is as follows:

"That all that part of Multnomah county in this State which lies west of the east boundary line of range 2 east of the Willamette meridian, and south of the north boundary line of township 1 north of the base line, be and the same is hereby created a separate district, to be known as the Port of Portland, and the inhabitants thereof are hereby constituted and declared to be a corporation by the name and style of the Port of Portland, and as such shall have perpetual succession, and by the said name shall exercise and carry out all the corporate powers and objects hereby conferred and declared, make all contracts, hold, receive and dispose of real and personal property, such as may be found requisite, necessary or convenient in carrying out the objects of said corporation, as herein set out and expressed, and sue and be sued, plead and be impleaded, in all actions, suits and proceedings brought by or against it."

Section 2 of said act is as follows:

"The object, purpose and occupation of said corporation, the Port of Portland, shall be to so improve the Willamette river at the cities of Portland, East Portland and Albina, and the Willamette and Columbia rivers between said cities and the sea, as that there shall be made and permanently maintained in said Willamette and

28 Columbia rivers between said cities and the sea a ship channel of good and sufficient width and having a depth at all points at mean low water, both at said cities and between said cities and the sea, of not less than twenty-five feet."

Section 3 of said act provides, among other things, as follows:

"So far as is necessary, requisite or convenient to carry out the said object, the said corporation shall have the full control of said rivers at said cities and between said cities and the sea, so far and to the full extent that this State can grant the same, and shall be and is hereby authorized to remove such obstructions therefrom, and erect such works therein, as may be found necessary or convenient in creating or maintaining the channel as aforesaid, and in section 2 hereof provided for."

Section 9 of said act provides that the power and authority given to said corporation, the Port of Portland, by said act, shall be vested in and exercised by a board of commissioners, which board of commissioners has been duly appointed and organized by the election of a president, vice-president, treasurer and secretary, as provided for in said act; and the improvement of said rivers as proposed in said act has been approved by the Secretary of War.

VI.

Defendant J. B. Montgomery is now, and for some time has been, engaged in the construction of a wharf on the east side of the Willamette river within the city of Portland, and is driving piles and otherwise proceeding with the construction of said wharf in said river outside of the wharf lines established as aforesaid, and proposes and declares his purpose to be to construct and com-
29 plete said wharf between the center line of Essex street projected to the river on the north and the center line of Randolph street projected to the river on the south, and extending into the river 85 feet beyond said wharf line, and occupying more than 30,000 square feet of the bed of said river.

VII.

On the second day of November, 1898, the board of commissioners of the Port of Portland, at a meeting duly called and held, duly adopted the following :

SIR : You and each of you are hereby notified that the Port of Portland, at a meeting duly and regularly held on Wednesday, the 2d day of November, 1898, passed the resolutions herewith, and that you were thereby and are required to cease driving any piles or placing any obstruction of any kind in the Willamette river beyond the wharf line established by the United States engineers prior to July 1, 1898, in front of the property owned by J. B. Montgomery and situate in what was formerly known as the city of Albina, and on which he is now constructing or causing to be constructed a wharf, and that you are required to remove from said river any piling or other obstruction from said river in front of said property and beyond said wharf line which you may have previously placed therein.

The property on which said wharf is being constructed, and herein referred to, is situate between the Willamette river on the west and River street on the east, the center line of Randolph street extended to the river on the south, and the center line of Essex street extended to the river on the north.

(*Copy of Preamble and Resolution Above Referred to.*)

30 " Whereas, the wharf line heretofore and prior to the first day of July, 1898, established by the United States engineers curtails the navigable waters of the Willamette river at the city of Portland, to the full extent which may be done in the interest of the shipping interests of this port.

" And, whereas, in order to provide sufficient space and width of channel to accommodate the fast-increasing shipping interests of this port, it will be necessary to, in the near future, so improve the channel of the said river at Portland and within the limits of this port as to make it twenty-five feet in depth within the entire limits of said port, and from the steel bridge crossing said river in the city of Portland and now used by the various railroads entering

said city of Portland, to the south end of Swan island, and to its full width as between said wharf lines so established as aforesaid.

"And, whereas, to allow any wharves to be extended into said river in this port and within the limits of the city of Portland beyond the wharf line aforesaid, will be of great and lasting damage to this port and the shipping interests thereof; now, therefore, be it

"Resolved, That the wharf line of this port and at the city of Portland, and on both sides of the Willamette river, be and the same is hereby established and fixed as the same as that heretofore and prior to the first day of July, 1898, established by the United States engineers, until the further action of this port.

"Whereas, one J. B. Montgomery, or those in his employ, or acting under him, is now engaged in or intends to construct a wharf on property owned by him and situate in what was at one time the city of Albina, and extending beyond said wharf line; therefore, be it

31 "Resolved, That the said J. B. Montgomery, and those acting under him, be notified to cease the construction of said wharf beyond said wharf line aforesaid, and to at once remove any piling or other obstruction which he may have placed in the river in front of his said property, and beyond said wharf line, and that if he shall fail to do so at once, that the executive committee be instructed to take such steps as may be necessary by legal proceedings or otherwise, to secure the object aforesaid.

"By order of the Port of Portland.

"J. McCRAKEN, *President.*

"J. A. BROWN, *Secretary.*"

Said notice was duly addressed to said defendant J. B. Montgomery, and a copy thereof, with a copy of the foregoing preamble and resolutions, were served on said defendant, on or about the third day of November, 1898, and a copy of the same was also served upon the person having charge of the work in the construction of said wharf.

VIII.

On the 23d day of November, 1898, at a meeting of the board of commissioners of said Port of Portland, duly called and held, the following resolution was passed:

"Whereas, on the 9th day of August, 1892, the United States engineers established a wharf line in the Willamette river, within the city of Portland, Oregon; and

"Whereas, said wharf line has been adopted and established for said city, and also by the Port of Portland; and

"Whereas, J. B. Montgomery is now engaged in the construction of a wharf in said river outside of said line; therefore be it

32 "Resolved, by the board of commissioners of the Port of Portland, That in our judgment, and we do hereby declare and decide, that the observance of said wharf line in the construction of wharves is necessary for a good and sufficient width of channel in said river within said city, and that the construction of said wharf, which said Montgomery proposes to extend 85 feet into

said river beyond said wharf line, will be an obstruction to our work in making and maintaining said width of channel; and, further, it is our judgment that said wharf when constructed as proposed by said Montgomery will interfere with the navigation of said river by creating shoal places in its now navigable waters, and will interfere with and obstruct our work in making and maintaining a channel in said river 25 feet in depth, as provided for in the act incorporating the Port of Portland," of which the defendant had due notice.

IX.

Ordinance No. 9071 of said city of Portland provides that "vessels arriving within the corporate limits of the city of Portland, if obliged to anchor, shall be anchored below the Albina ferry and on the west side of the main ship channel," which provision makes a wide and deep waterway necessary in that locality to accommodate the large and rapidly increasing commerce of the Willamette river.

Said ordinance also provides that "vessels must not be anchored or moored in the fairway channel within the city limits."

Said Montgomery wharf is below and near said Albina ferry.

X.

The Willamette river is a river wholly within the State of Oregon.

33

XI.

Said defendant J. B. Montgomery, notwithstanding said ordinance and the said proceedings of said Port of Portland, persists in the construction of said wharf as aforesaid, and will, unless restrained by an order of this honorable court, complete said wharf in the manner and to the extent above indicated.

XII.

Plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs pray that said defendant J. B. Montgomery, his attorneys, agents, servants and employés, may be enjoined and restrained from driving piles or putting any other structures in said river outside of said wharf line, with a view to the construction of said or any wharf, and that a decree and order may be made and entered by this court directing and commanding the said J. B. Montgomery, his agents, servants and employés, to remove from said river all piles driven or structures of any description made or put in said river outside of said wharf lines in the construction of said wharf; and that plaintiffs may have such other and further relief as is meet with equity and good conscience, and also a judgment for their costs and disbursements herein expended.

WILLIAMS, WOOD & LINTHICUM AND
J. M. LONG, *City Attorney*,
Attorneys for Plaintiffs.

STATE OF OREGON, } ss:
County of Multnomah, }

I, J. McCraken, being first duly sworn, say that I am the president of The Port of Portland, one of the above-named plaintiffs, and that the foregoing complaint is true, as I verily believe.

J. McCRAKEN.

34 Subscribed and sworn to before me this 25th day of November, 1898.

H. H. PARKER,
[SEAL.] *Notary Public in and for Oregon.*

On the 10th day of December, 1898, the defendant filed his answer, of which the following is a copy:

Answer of the Defendant, James B. Montgomery, to the Bill of Complaint of The City of Portland and The Port of Portland, Plaintiffs.

The defendant, James B. Montgomery, now and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said bill of complaint filed herein contained, and especially protesting that the said bill of complaint herein is wholly insufficient, in this, that it does not state facts sufficient to constitute a cause of suit in equity or otherwise, for answer thereto says:

I.

This defendant, James B. Montgomery, admits that the City of Portland is a municipal corporation of the State of Oregon, incorporated and existing by and under the laws of said State.

II.

This defendant admits that the charter of the said City of Portland provides that said common council of said city shall have power to regulate the building of wharves and the driving of piles in the Willamette river within the limits of said city, and to
35 establish a line beyond which wharves shall not be built or piles driven, and that such provision has been in the charter of said city of Portland since February 19, 1891. But defendant avers, as will more fully appear hereinafter, that the State of Oregon had no jurisdiction or power whatever, either on the 19th day of February, 1891, or at any time since, to authorize the said common council of the said city of Portland to establish a line within the limits of said city in the Willamette river beyond which wharves shall not be built or piles driven; and this defendant avers that the three several charters of the city of Portland, and each of them, containing such provision, and filed in the office of the secretary of state respectively February 19, 1891, consolidated charter, Session Laws of 1891, page 796; and February 23, 1893, Session Laws of 1893,

page 822; and the charter passed by the extra session of the Legislative Assembly of the State of Oregon of 1898, filed in the office of the secretary of state October 17, 1898, in so far as they attempt to clothe the common council of the city of Portland, or the City of Portland, or the Port of Portland, with authority to establish the harbor lines in the city of Portland, are *ultra vires* and void.

III.

Defendant admits that harbor lines were established in the Willamette river within the city of Portland, State of Oregon, on the 9th day of August, 1892, by the United States engineers, and that such harbor lines were caused to be established by the Secretary of War of the United States in pursuance of the authority conferred on him by the twelfth section of the act known as the river and harbor act,
and entitled "An act making appropriations for the construc-
36 tion, repair and preservation of certain public works on rivers
and harbors, and for other purposes," passed September 19, 1890 (Supplement to the Revised Statutes of the United States, pages 800–803). And this defendant avers that such harbor lines are the same lines described in subdivision III of the bill of complaint as "wharf lines."

IV.

Defendant admits that the common council of the city of Portland, on the 12th day of December, 1892, adopted an ordinance, No. 7995, entitled "An ordinance establishing a wharf line on the city front," by which it was attempted to establish the wharf lines of the Willamette river within said city of Portland in conformity to and coincident with the wharf or harbor lines established by the Secretary of War August 9, 1892, as hereinbefore stated and described in subdivision IV of the bill of complaint as "the wharf lines established by said United States engineers as aforesaid." But this defendant avers that neither the said common council of the city of Portland, nor the said City of Portland as a municipal corporation, had any jurisdiction, authority or power whatever to pass said ordinance, or any ordinance establishing the wharf lines or harbor lines at any point or place within the said city of Portland. And this defendant avers that said ordinance, in so far as it attempts to establish wharf lines or harbor lines within said city of Portland, is *ultra vires* and void. And defendant avers that said section III of said ordinance, passed the 12th day of December, 1892, and referred to in the complaint, is *ultra vires* and void.

V.

And defendant, James B. Montgomery, admits that the
37 Legislative Assembly of the State of Oregon, on the 19th day
of February, 1891, passed an act as stated in subdivision V of the bill of complaint, entitled "An act to establish and incorporate the Port of Portland, and to provide for the improvement of the Willamette and Columbia rivers in said port and between said port and the sea;" and defendant admits that sections 1, 2, 3 and

9 of said act are as set out in the bill of complaint. But defendant avers that said act confers no jurisdiction or power whatever upon the Port of Portland to establish wharf or harbor lines in the Willamette river within the limits of the city of Portland; that such act, by a fair construction, does not confer upon the plaintiff, The Port of Portland, jurisdiction or power to establish any wharf or harbor lines which in any manner conflict with the harbor lines established within the city limits of said city of Portland by the Secretary of War, and the State of Oregon had no jurisdiction or power to confer upon The Port of Portland, one of the plaintiffs herein, jurisdiction or power to establish any harbor lines within the city limits of the city of Portland which in any manner may conflict with the harbor lines established by the Secretary of War within the limits of said city.

VI.

Defendant, further answering subdivision VI of the bill of complaint, admits that he has for some time been engaged in the construction of a wharf on the east side of the Willamette river, within the city of Portland; that he is driving piles and otherwise proceeding to the construction of said wharf in said river, a portion of which wharf is being constructed outside of wharf lines or harbor lines established by the Secretary of War August 9, 1892, and that it is his purpose to construct and complete said wharf for the
38 accommodation of ships and in aid of the commerce of the Willamette river between the center line of Essex street, projected to the river, on the north, and the center line of Randolph street, projected to the river, on the south, and extending into the river at one point *only* about eighty-five feet beyond said wharf or harbor line established by the Secretary of War August 9, 1892, as aforesaid. But defendant avers, as will more fully and specifically appear hereinafter in this answer, that the said harbor line along and in front of and above and below for some distance where defendant is constructing his said wharf was, on the 23d day of September, 1898, re-established and located by the Secretary of War on a different line from that established by him August 9, 1892, and the precise location of which will be made fully to appear hereinafter in this answer. And defendant avers that he is constructing said wharf wholly within and inside of such harbor line as re-established by the Secretary of War, September 23, 1898, and with and by the permission of the Secretary of War, and the same is being constructed on lands owned by this defendant.

VII.

Defendant, further answering subdivision VII of the bill of complaint, denies any knowledge or information sufficient to form a belief as to whether on the 2d day of November, 1898, or at any other time, the board of commissioners of the Port of Portland had a meeting duly called or held, or otherwise adopted the resolution set out in the bill of complaint. Said defendant denies any knowledge or information sufficient to form a belief as to whether or not, on the 23d

day of November, 1898, or at any time, at a meeting of the board of commissioners of said Port of Portland, duly called and held, or
39 otherwise, the resolution set out in the bill of complaint was passed. But this defendant avers that said Port of Portland, one of the plaintiffs herein, had no jurisdiction or power whatever to establish and fix the wharf or harbor lines in said city as that established by the engineers prior to the 1st day of July, 1898, as set out in the resolutions alleged to have been adopted by the plaintiff, The Port of Portland, on the 2d day of November, 1898, and such resolutions, if adopted, this defendant declares to be *ultra vires* and void.

VIII.

Defendant avers in answer to subdivision IX of the bill of complaint, that the construction of defendant's wharf at the place he is constructing the same will not in any manner interfere with the anchorage of ships below the Albina ferry, as provided by said ordinance No. 9071, as averred in the bill of complaint, nor in any manner interfere with the navigation or commerce of said river.

IX.

Defendant admits that the Willamette river is a river wholly within the State of Oregon, but avers that the said river to and above the point where the defendant is constructing his wharf is navigated regularly, every day in the year, by ships connecting with and navigating the Pacific ocean; that the tide ebbs and flows on said river within the city limits of the city of Portland, and that the waters of said river within the limits of such city are navigated by boats and officers licensed by the United States, and that said city of Portland is a port of entry established by an act of Congress.

And defendant further answering plaintiff's bill of complaint, avers that Congress has heretofore, in its power to regulate
40 commerce among foreign nations, exercised jurisdiction over the Willamette river by authorizing, prior to September 19, 1890, by three special acts, the construction of three bridges over said river within the limits of the city of Portland, and on August 9, 1892, the Secretary of War caused harbor lines to be established within the limits of said city in pursuance of the authority conferred on him by the twelfth section of the act of Congress passed September 19, 1890, known as the river and harbor act, and since said date, August 9, 1892, the control of said Willamette river, in so far as the establishment of harbor lines is concerned, has been and still is exclusively vested in Congress.

X.

This defendant, referring to the alleged resolutions of the Port of Portland, set out in the complaint:

Denies that the wharf or harbor lines established by the Secretary of War prior to the 1st day of July, 1898, curtails the navigable waters of the Willamette river at the city of Portland to the

full extent which may be done in the interest of the shipping interests of the Port of Portland.

Denies that the construction of defendant's wharf at the place the same is being constructed in any manner curtails the navigable waters of the Willamette river within the limits of the city of Portland, or that the construction of the same will be of great or lasting damage, or any damage whatever, to the Port of Portland or to the shipping interests thereof.

Denies that the observance of the wharf or harbor lines established by the Secretary of War August 9, 1892, is necessary for a good and sufficient width of channel in said Willamette river within the limits of said city.

41 Denies that the construction of the wharf by this defendant, as alleged, and as intended to be constructed by him, will be any obstruction to the work of the Port of Portland in making and maintaining a proper width of channel.

Denies that said Port of Portland has any jurisdiction or power to determine the width of channel of the Willamette river within the limits of the city of Portland.

Denies that said wharf when constructed will interfere with the navigation of said river, by creating shoal places in its now navigable waters.

Denies that the construction of said wharf will create shoal places in the now navigable waters of said river, or that the construction of said wharf will interfere with or obstruct the work of the Port of Portland in making or maintaining in said river a channel twenty-five feet in depth, as provided for in the act incorporating the Port of Portland.

And defendant, James B. Montgomery, for a further and separate answer herein to the bill of complaint avers:

I.

That in pursuance of authority conferred on him by section 12 of the river and harbor act, entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," passed September 19, 1890 (Supplement to the Revised Statutes of the United States, vol. 1, 2d edition, pages 800–803), the Secretary of War did, on the 9th day of August, 1892, cause to be established in the harbor of Portland, Oregon, in the Willamette river, harbor lines beyond and

42 outside of which it was unlawful to construct any piers, wharves, bulkheads or other works, except under such regulations as might be from time to time permitted by the Secretary of War, or in such manner as shall obstruct or impair the navigation, commerce or anchorage of the waters of said Portland harbor; that a portion of said wharf lines so caused to be established by said Secretary of War, as aforesaid, was located on the 9th day of August, 1892, on the east side of said harbor in the Willamette river, within the city limits of the city of Portland, for a distance at and along, and for some distance above and below where defendant Montgomery is constructing his wharf, as in the bill of complaint alleged, on

a line as distinctly marked "Harbor line approved by the Secretary of War August 9, 1892," on a map or plat of the United States Government engineers, certified to August 23, 1898, by W. L. Fiske, major corps of engineers, U. S. A., and entitled "Harbor line, Portland, Oregon, Randolph street to Russell street, surveyed August 6–13, 1898," and which map or plat also contains the following: "War Department, September 23, 1898. The change in the harbor line shown in red herein is approved. G. D. Meiklejohn, acting Secretary of War," and which map is marked "Exhibit A" and made a part of this answer. And defendant avers that such harbor lines so laid down and represented on said map "Exhibit A" is a part of the same line referred to in the bill of complaint and therein averred as having been established "by the United States engineers, August 9, 1892." And defendant further avers that said harbor line from Randolph street extended to Russell street extended near the southern end of "North Pacific Terminal Company's dock," as
43 represented by said map, "Exhibit A," was established without sufficient survey, data or soundings to fully and properly develop the shape or character of the ground beneath the water, or the course and shape of the natural bend of the river under water at such points, and such harbor line at such point and for a distance as above mentioned, was located and established, the true interests of commerce and the protection and preservation of such harbor being considered too near the shore or eastern line of such Willamette river, and along water of an average depth, for the distance aforesaid, of less than two feet at low water, as marked by figures on and along said line on said map, "Exhibit A."

And this defendant, further answering, avers that on or about May —, 1898, he presented his petition to the Secretary of War, which petition was, on the 17th day of August, 1898, amended by the defendant at the request of Major W. L. Fiske, major corps of engineers, U. S. A., so as to more definitely describe the change in the harbor line asked for, in which petition he presented these facts as to the improper location of such harbor line at such point, and for the distance between Randolph street extended and Russell street extended, and prayed that the Secretary of War might relocate and re-establish said harbor line between said two streets by changing the same in the manner as indicated on said map "Exhibit A," by a red line, formed by the "extension to an intersection in front of the property of the defendant, between Essex and Marion streets, of the harbor lines established by the Secretary of War August 9, 1892, in front of the present 'Montgomery dock,' as designated on said map, 'Exhibit A,' and in front of the Northern
44 Pacific Terminal Company's dock," as designated and described on said map "Exhibit A," and which red line is designated on said map as follows: "Change desired by J. B. Montgomery, per his letter of August 17, 1898."

And defendant, further in his said application, asked the permission of the Secretary of War to locate his wharf in front of his property lying between Essex and Randolph streets, and known and

numbered as lots 1, 2, 3, 4, 5, 6, 7 and 8, beyond the harbor line as established by the Secretary of War August 9, 1892, and up to the line as represented by said red line on map, "Exhibit A."

And defendant further avers that the Secretary of War, on receipt of his said application of this defendant, directed that a public hearing be had on the subject, before Major W. L. Fiske, major corps of engineers, U. S. A., at Portland, Oregon, with a view of ascertaining whether such change in said harbor lines as prayed for by defendant, and whether his prayer for permission to extend his said wharf beyond the harbor line established August 9, 1892, should be granted. And defendant avers such public hearing was had by said Major Fiske on August 5, 1898, and to which the public were invited, and at which were a number of the leading business men of the city of Portland interested in the preservation and protection of the harbor of Portland, and whose views and opinions and protests were received in writing by Major Fiske, and all of which, with his report, were forwarded to the Chief of Engineers of the War Department; that subsequently, after full examination and consideration of the case, including the report of Major Fiske and the accompanying evidence and protests, the Chief of Engineers of the War Department submitted his
45 report to the Secretary of War, in which he recommended that the prayer of this defendant, as hereinbefore stated, be in all respects granted, and subsequently, to wit, on the 23d day of September, 1898, the Secretary of War approved said report of the Chief of Engineers, and changed said harbor line as prayed for by defendant as aforesaid, as will fully appear by the indorsement of the Secretary of War, of date September 23, 1898, on the map "Exhibit A," which map, "Exhibit A," is certified to by A. Mackenzie, acting Chief of Engineers, by his certificate of date November 26, 1898, to the effect that the same is a true copy of the map on file in the office of the Chief of Engineers, United States Army, and which certificate is further authenticated by the certificate of G. D. Meiklejohn, acting Secretary of War, under date of November 28, 1898, and which certificate is marked "Exhibit B," and attached hereto, and to said map, "Exhibit A," and made a part of this answer.

And defendant avers that by virtue of said proceedings, as hereinbefore described, and of the action upon the part of the acting Secretary of War of September 23, 1898, said harbor line was re-established and relocated by the Secretary of War between Randolph and Russell streets, extended, on the line formed by an extension to an intersection in front of defendant's said property of the harbor lines established August 9, 1892, in front of the present "Montgomery dock," and in front of the "Northern Pacific Terminal Company's dock," as designated and described on the map, "Exhibit A," hereto attached, and by the red line thereon, and such location of the harbor lines so re-established by the Secretary
46 of War September 23, 1898, is otherwise described as follows, and as in this defendant's application as amended August 17, 1898, in response to the written request of Major W. L. Fiske, major

corps engineers, U. S. A., as aforesaid, namely: "A prolongation northward of the present established wharf line (produced) from Randolph street to an intersection with a prolongation southward of the present established wharf line along the face of the Northern Pacific Terminal Company's dock or wharf, from the intersection of said line with the central line of Russell street (produced)." That these two descriptions designate the same line precisely, and it is the same indicated by the red line on the map, "Exhibit A." And by said action of the Secretary of War said line was not only relocated and re-established as stated, but this defendant was given permission to extend his wharf beyond the harbor line established August 9, 1892, and up to the harbor line as re-established as aforesaid, and as indicated by said red line on the map, "Exhibit A," hereto attached.

And defendant, J. B. Montgomery, further avers that he is constructing his said wharf and intends to construct the same wholly within the said harbor line thus established by the Secretary of War September 23, 1898, and has not driven any piles or placed any timbers, nor does he intend to, outside of said harbor line.

Defendant further avers that neither the State of Oregon, nor the plaintiffs, The City of Portland, nor The Port of Portland, nor any of them, has any jurisdiction or power whatever to establish any wharf or harbor line within the limits of the city of Portland in the Willamette river, which in any manner conflicts with the harbor line so caused to be established by the Secretary of War September
47 ber 23, 1898, as aforesaid, nor has the State of Oregon nor the City of Portland nor the Port of Portland any jurisdiction, power or right whatever to interfere with the construction of his wharf by this defendant at the place and in the manner he is constructing it, and as he intends to complete it as aforesaid.

Defendant further avers that the construction of his wharf as the same is being constructed by him does not in any manner or to any extent do any injury or damage whatever to the navigation or commerce of the Willamette river within the limits of the city of Portland, but, on the contrary, defendant avers that said change in said harbor lines, as caused to be made by the Secretary of War, September 23, 1898, and the construction of defendant's wharf as he is constructing the same, will be an improvement of the harbor in the city of Portland and will be in aid of navigation and commerce and of international commerce as well.

Defendant further avers that in the harbor line as established August 9, 1892, there were two angles in the pier-head line, while by the change caused to be made by the Secretary of War September 23, 1898, there is only one, and the change in this respect is an advantage to the harbor. The harbor lines as located across the property of this defendant by the action of the Secretary of War of August 9, 1892, were practically on dry land at low water, there not being an average depth of as much as two feet of water along said line, the line running for over seven hundred feet distance in four, three, two and naught feet of water, at one point on dry ground at low water.

Defendant further avers that one of the purposes of the construction of the wharf by him is to locate thereon a large and
48 commodious warehouse for the storage of grain for shipment; that the warehouse facilities for the port of Portland are wholly insufficient in number and capacity to meet the demands of shippers.

Defendant avers that, if restricted in the location of his wharf to the harbor lines as established August 9, 1892, the cost of dredging in order to obtain the necessary depth of water to enable ships to come to the wharf would be so enormous as to wholly prevent the improvement; that the bottom of the river at and along and in front of defendant's said property consists in a great part of cement gravel, which would require blasting; and defendant avers, although permitted to construct his wharf up to the harbor line as established by the Secretary of War September 23, 1898, along which the depth of water ranges from three to thirteen feet at one point, the average depth of water along said line in front of the proposed wharf and warehouse being not over five or six feet, he will still be compelled to spend a very large amount of money in dredging in the character of ground as stated, in order to enable ships of ordinary draft to come to his wharf at low water. And defendant further avers that the construction of his said wharf at the place and in the manner he is constructing and intends to complete the same, does not in any respect curtail the navigable waters of the Willamette river at the city of Portland, nor is the same nor will it be any obstruction to navigation or to the work of the port of Portland in making and maintaining a proper depth of water, in so far as said port of Portland may have any rights in the premises. Defendant avers that the construction of such wharf as planned and being constructed by him, instead of being any injury to the commerce or nav-
49 igation of the Willamette river at the port of Portland, will be a benefit to the same and a valuable aid in the carrying on of foreign and interstate commerce at said port of Portland.

II.

Defendant, further answering plaintiffs' bill of complaint, avers that the Willamette river is a river wholly within the State of Oregon, and avers that the said river to and above the point where the defendant is constructing his w-arf, is navigated regularly, every day in the year, by ships connecting with and navigating the Pacific ocean; that the tide ebbs and flows on said river within the limits of the city of Portland, and that the waters of said river within the limits of such city are navigated by boats and officers licensed by the United States, and that said city of Portland is a port of entry established by an act of Congress.

And defendant, further answering plaintiffs' bill of complaint, avers that Congress has heretofore, in its power to regulate commerce among foreign nations, exercised jurisdiction over the Willamette river by authorizing, prior to September 19, 1890, by three special acts, the construction of three bridges over said river within the limits of said city of Portland, and on August 9, 1892, the Sec-

retary of War caused harbor lines to be established within the limits of said city in pursuance of the authority conferred on him by the twelfth section of the act of Congress passed September 19, 1890, known as the river and harbor act, and since said date, August 9, 1892, the control of said Willamette river, in so far as the establishment of harbor lines is concerned, has been and still is exclusively vested in Congress, and the Congress has, in the exercise of such jurisdiction and control, made frequent appropriations of
50 money in the past for the improvement of the navigation of the waters of the Willamette river and in aid of foreign commerce between the city of Portland and foreign nations, which appropriations have been expended in improving said river.

This defendant, James B. Montgomery, denying all manner of unlawful acts and doings wherewith he is by the said bill of complaint charged, submits that the plaintiffs have not on their bill shown any case in equity, or any case entitling them to proceed against him, either in the court from which this suit was removed, or in this honorable court, and praying that he be permitted all such benefit as if he had demurred to the said bill, both as to the question that the bill of complaint does not state facts sufficient to constitute a cause of suit, and as to the lack of jurisdiction in the court, he prays that the writ of injunction heretofore issued in this suit may be dissolved, and plaintiffs' suit directed to be dismissed, and that the defendant may have judgment against the plaintiffs for his reasonable costs and disbursements.

STOTT, BOISE & STOUT AND
MITCHELL & TANNER,
Solicitors for Defendant.

UNITED STATES,
District of Oregon, } *ss:*

I, James B. Montgomery, being first duly sworn, say: That I am the defendant in the above-entitled suit, and that the foregoing answer is true, as I verily believe.

JAMES B. MONTGOMERY.

Subscribed and sworn to before me this — day of December, 1898.

H. C. ROBERTSON,
[SEAL.] *Notary Public for Oregon.*

51 *Copy of "Exhibit B" Attached to Answer of Defendant.*

UNITED STATES OF AMERICA,
WAR DEPARTMENT,
WASHINGTON CITY, *November* 26, 1898.

I hereby certify that the map hereto attached is a true copy of a map on file in the office of the Chief of Engineers, United States Army.

A. MACKENZIE,
Acting Chief of Engineers.

Be it known, that A. Mackenzie, who signed the foregoing certificate, is the acting Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and [SEAL.] caused the seal of the War Department to be affixed, on this twenty-eighth day of November, one thousand eight hundred and ninety-eight.

G. D. MEIKLEJOHN,
Assistant Secretary of War.

On the 10th day of December, 1898, plaintiff- filed a motion, of which the following is a copy:

Now come the above-named plaintiffs and move to strike out from the answer of the above-named defendant the clauses hereinafter designated, upon the grounds that the same are irrelevant and immaterial:

52

I.

All that part of subdivision IV of said answer commencing with the word "but" in line 18 of page 3, and ending with the word "void" in line 29 of the same page.

II.

All that part of subdivision V of said answer commencing with the word "but" in line 7 of page 4, and ending with the word "city" in line 21 of the same page.

III.

All that part of subdivision VII of said answer commencing with the word "but" in line 30 of page 5, and ending with the word "void" in line 5 of page 6.

IV.

All of subdivision VIII of said answer commencing with the word "defendant" in line 8, and ending with the word "river" in line 14 of page 6.

V.

All that part of subdivision IX of said answer commencing with the word "and" in line 28 of page 6, and ending with the word "Congress" in line 7 of page 6½.

VI.

All of subdivision X of said answer commencing with the word "this" in line 10 of page 6½, and ending with the word "Portland" in line 8 on page 6¾.

VII.

Also all that part of said answer between the word "and" in line 7 of page 8 and the words "Exhibit A" in line 22 of the same page.

VIII.

Also all that part of said answer between the word "defendant" in line 21 of page 11 and the word "aforesaid" in line 32 of the same page.

53 IX.

Also all that part of said answer commencing with the word "defendant" in line 33 on page 11, and ending with the word "well" in line 9 of page 12.

X.

Also all that part of said answer commencing with the word "defendant" in line 10, and ending with the word "water" in line 21 of page 12.

XI.

Also all that part of said answer commencing with the word "defendant" in line 22 of page 12, and ending with the word "shippers" in line 27 of the same page.

XII.

Also all that part of said answer commencing with the word "defendant" in line 28 of page 12, and ending with the word "Portland" in line 24 of page 13 of said answer.

XIII.

Also all that part of said answer commencing with the word "and" in line 5 of page 14, and ending with the word "river" in line 24 of page 14.

WILLIAMS, WOOD & LINTHICUM AND
J. M. LONG, *City Attorney*,
Attorneys for Plaintiffs.

On the 10th of December, 1898, plaintiffs filed a demurrer, of which the following is a copy:

Now come the above-named plaintiffs and demur to that part of the answer of said defendant James B. Montgomery setting
54 up the action of the Secretary of War on the 23d day of September, 1898, commencing with the word "and" in line 23 of page 8, and ending with the word "line" in line 20 of page 11 of said answer; for the reason that the same does not state facts sufficient to constitute any defense in this suit.

WILLIAMS, WOOD & LINTHICUM AND
J. M. LONG, *City Attorney*,
Attorneys for Plaintiffs.

And thereafter and on the 11th day of February, 1899, the said court made and filed findings of fact and conclusions of law, of which the following are copies:

Now at this day this cause came on to be heard on the merits, the

plaintiffs, The City of Portland and The Port of Portland, appearing by George H. Williams, their attorney, and the defendant, James B. Montgomery, appearing by Stott, Boise & Stout and Mitchell & Tanner, his attorneys, and it is agreed in open court by the said attorneys of the respective parties that this case shall be submitted to the court for findings of fact and a final decree on the pleadings in the case, the written stipulations of the attorneys of the respective parties aforesaid, and the affidavits, documents, maps, letters, certificates, orders of the Secretary of War, United States engineers, and other papers heretofore filed in this cause by the respective parties, including six letters marked respectively "Letter Exhibits A, B, C, D, E and F," this day filed by the attorneys for the defendant.

55 And the court, after due consideration of the pleadings and evidence submitted by the respective parties as aforesaid, and the argument of counsel, makes the following findings of fact and conclusions of law:

Findings of Fact.

First. That the plaintiff, The City of Portland, is a municipal corporation, duly incorporated by the legislature of the State of Oregon; that among other powers conferred upon the common council of said city of Portland, the charter of said city provides as follows: "To regulate the building of wharves and the driving of piles in the Willamette river, within the limits of the city, and to establish a line beyond which wharves shall not be built, nor piles be driven," and that said provision has been since February 19, 1891, and is now in full force and effect.

Second. That on the 9th day of August, 1892, the Secretary of War, of the United States, in pursuance of the authority conferred on him by the twelfth section of an act of Congress known as the river and harbor act, and entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," passed September 19, 1890 (Supplement to the Revised Statutes of the United States, pages 800–803), caused harbor lines to be established in the Willamette river within the limits of the city of Portland and that such harbor lines are the same lines described in subdivision three of the bill of complaint herein as "wharf lines."

Third. That on the 12th day of December, 1892, the common council of the city of Portland adopted an ordinance num-

56 bered 7995, entitled "An ordinance establishing a wharf line on the city front," and by which the common council of the city of Portland adopted in so far as it had any power in the premises, as the wharf lines of the city the harbor lines established by the Secretary of War, as set out in the second of these findings of fact herein; that section 3 of said ordinance provides as follows:

"All w[l] arves or other structures hereafter built or erected on the river front of the city on the east side of the Willamette river shall not extend westerly beyond the line as laid down in section 1 of

this ordinance, and all permits hereafter granted by the common council for the driving of piles or erection of structures shall conform to said line."

Fourth. That on the 18th day of February, 1891, the Legislative Assembly of the State of Oregon passed an act, entitled "An act to establish and incorporate the Port of Portland and to provide for the improvement of the Willamette and Columbia rivers in said port and between said port and the sea."

That sections 1, 2, 3 and 9 of said act are as follows:

"SEC. 1. That all that part of Multnomah county in this State which lies west of the east boundary line of range 2 east of the Willamette meridian, and south of the north boundary line of township 1 north of the base line, be and the same is hereby created a separate district to be known as the Port of Portland, and the inhabitants thereof are hereby constituted and declared to be a corporation by the name and style of the Port of Portland, and as such shall have perpetual succession, and by the said name shall exercise and carry out all the corporate powers and objects hereby conferred and
57 declared, make all contracts, hold, receive and dispose of real and personal property, such as may be found requisite, necessary or convenient in carrying out the objects of said corporation as herein set out and expressed, and sue and be sued, plead and be impleaded in all actions, suits and proceedings brought by or against it."

Section 2 of said act is as follows:

"SEC. 2. The object, purpose and occupation of said corporation, the Port of Portland, shall be to so improve the Willamette river at the cities of Portland, East Portland and Albina and the Willamette and Columbia rivers between said cities and the sea, as that there shall be made and permanently maintained in said Willamette river at said cities and in the said Willamette and Columbia rivers, between said cities and the sea, a ship channel of good and sufficient width, and having a depth at all points at mean low water, both at said cities and between said cities and the sea, of not less than twenty-five feet."

That soon after the passage of said act incorporating the Port of Portland, a copy of the same was transmitted by the president of said Port of Portland to the then Secretary of War, who approved the same, and that the work of the said Port of Portland in improving the Columbia and Willamette rivers has been conducted in conjunction with the United States engineers in charge of said rivers, acting under instructions from the Secretary of War, and said engineers have annually reported to said Secretary the nature and extent of said work by said Port of Portland. But there is no evidence in the case showing or tending to show that any dredging or other work of any kind whatever in the improvement of said Willamette river has ever been done by the said Port of Port-
58 land, on the inside or land side of the harbor line as relocated by the Secretary of War, September 23, 1898, or in the vicinity thereof, either above or below the same, nor that the Secre-

tary of War has at any time suggested or recommended any such dredging or widening of the channel in that locality.

Section 3 of said act provides among other things as follows:

"SEC. 3. So far as is necessary, requisite or convenient to carry out the said object, the said corporation shall have the full control of said rivers at said cities and between said cities and the sea, so far and to the full extent that this State can grant the same, and shall be and is hereby authorized to remove such obstructions therefrom and erect such works therein as may be found necessary or convenient in creating and maintaining the channel as aforesaid, and in section 2 hereof provided for."

Section 9 of said act provides that the power and authority given to said corporation, the Port of Portland, by said act, shall be vested in and exercised by a board of commissioners, which board of commissioners was, prior to the commencement of any proceedings connected with this suit, duly appointed and organized by the election of a president, vice-president, treasurer and secretary, as provided for in said act.

Fifth. That that portion of the harbor lines so caused to be established as aforesaid by the Secretary of War on the 9th day of August, 1892, on the east side of said harbor in the Willamette river, within the city limits of the city of Portland, for a distance at and along and for some distance above and below where the defendant James B. Montgomery is constructing his wharf, as hereinafter referred to in this finding of fact, and as in the bill of complaint alleged, on a line as designated and marked "Harbor line approved by the Secretary of War, August 9, 1892," on a map or plat of the United States Government engineers, certified to August 23, 1898, by W. L. Fiske, major corps engineers, U. S. A., and entitled, "Harbor line, Portland, Oregon, Randolph street to Russell street, surveyed August 6–13, 1898," and which map or plat also contains the following: "War Department, September 23, 1898. The change in the harbor line shown in red herein is approved. G. D. Meiklejohn, acting Secretary of War," and which map is marked "Exhibit A," and made a part of the answer of the defendant James B. Montgomery herein, and which harbor line is so laid out and represented on said map "Exhibit A," is a part of the same line referred to in the bill of complaint and therein averred as having been established "by the U. S. engineers, August 9, 1892."

59

That the defendant James B. Montgomery was at the time of the commencement of this suit and still is the owner of the land fronting on the Willamette river, and of whatever riparian rights attach thereto, for the whole distance of the line in controversy in this suit.

Sixth. That on or about May 21, 1898, the defendant, James B. Montgomery, presented his petition to the Secretary of War, in which he claimed that said harbor line, established August 9, 1892, in front of water lots 1, 2, 3, 4, 5, 6 and 7 was located too far inland, and at many points in water only six inches to two feet in depth, and praying that said line in front of said lots and for the distance as hereinafter particularly described should be relocated; that the

Secretary of War, on receipt of said application of the de-
60 fendant Montgomery, directed that a public hearing be had on the subject before Major W. L. Fiske, major corps of engineers, U. S. A., at Portland, Oregon, with the view of ascertaining whether such change in said harbor lines as prayed for by defendant, and whether his prayer for permission to extend his wharf beyond the harbor line established August 9, 1892, should be granted; that such public hearing was had by Major Fiske on August 5, 1898, and pending which the petition of the defendant Montgomery was, on the 17th day of August, 1898, amended by him at the written request of Major W. L. Fiske, major corps engineers, U. S. A., so as to more definitely describe the change in the harbor line asked for, which amendment was embodied in a communication from the defendant James B. Montgomery, of which the following is a copy:

"PORTLAND, OREGON, *Aug.* 17, 1898.

To Major W. L. Fiske, corps engineers, in charge river and harbor improvements, etc.

DEAR SIR: In reply to your letter asking for a definite location of the change in the established wharf line in front of my property in Albina, as desired by me, I would state as follows, viz:

I respectfully ask that the established wharf line be relocated according to the following description:

'The prolongation northward of the present established wharf line, from the center line (produced) at Knight street, and the center line (produced) of Randolph street, to an intersection of a prolongation southward of the present established wharf line along the face of the Northern Pacific Terminal Company's dock or wharf, from the intersection of said line with the center line of Russell street (produced).'

Very respectfully yours, J. B. MONTGOMERY."

61 In such amendment the defendant Montgomery defined the change prayed for substantially as follows, and as now indicated on said map "Exhibit A" to the answer by a red line formed as follows: "By the extension to an intersection in front of the property of the defendant between Essex and Marion streets of the harbor lines established by the Secretary of War August 9, 1892, in front of the present 'Montgomery dock' as designated on said map 'Exhibit A,' and in front of the Northern Pacific Terminal Company's dock, as designated on said map 'Exhibit A,' and which red line is designated on said map as follows: 'Change desired by J. B. Montgomery, per his letter of August 17, 1898.'"

And to which hearing the public were invited, and at which were a number of the leading business men of the city of Portland interested in the preservation and protection of the harbor of Portland, and whose views and opinions and protests were received in writing by Major Fiske, and all of which, with his report, were forwarded to the Chief of Engineers of the War Department, the report of Major Fiske being adverse to such change.

Seventh. That subsequently on September 1, 1898, John M. Wilson, brigadier general, Chief of Engineers, United States Army, transmitted to the Secretary of War the papers in the case, including a map showing the harbor line established by the Secretary of War on August 9, 1892, and also the line claimed by Mr. Montgomery, and on which he claimed said harbor line should be relocated, a copy of which map is "Exhibit A," attached to the answer herein,
62 accompanied by his report, of which the following is a copy:

8th indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *Sept.* 1, 1898.

Respectfully returned to the Secretary of War.

This is a case of an application of Mr. J. B. Montgomery, of Portland, Oregon, for a change of the harbor lines at Portland from those ordered by the Secretary of War August 9, 1892, so as to admit of the construction of a dock, the outer limit of the extreme point of which will be about eighty-five feet in advance of the present harbor line.

The object of Mr. Montgomery, as stated by him, is to avoid the necessity of the expense of dredging about 22,000 cubic yards of hard material.

If the request is granted it will withdraw a little more than one acre of the harbor room of Portland, Oregon, and will add about two-thirds of an acre to Mr. Montgomery's dock property.

A public hearing upon this subject was held by Major W. L. Fisk, corps of engineers, in Portland on August 5, 1898, at which a number of prominent citizens were present, and views were expressed in favor and against granting Mr. Montgomery's request. A number of letters advocating and opposing the change in the harbor lines were presented and are submitted herewith. After a careful consideration of all the facts, Major Fisk sums up the objections of those opposing the change requested by Mr. Montgomery *and expressed the opinion that the harbor lines should remain as established by the Secretary of War in 1892.*

The objections presented are as follows:

63 "First. The projecting angle in the proposed new harbor line would be likely to cause deposits below it, because it would necessarily check the current at that point during high water, the time at which sediment is carried."

I do not concur in the point made in this objection; on the contrary, I believe the slight contraction suggested would correspondingly increase the current and scouring force at the locality.

"Second. The reduction of the high-water cross-section by the proposed change would have a slight choking effect on the floods, not of great importance however."

In my opinion the choking effect, if any, would be immaterial.

"Third. The reduction of the harbor area is the important objection, as it is in this portion of the river that sea-going vessels anchor before docking and after loading, and are obliged to maneuver both

arriving and departing, and no encroachment upon the already limited harbor area should be permitted in view of the rapidly increasing commerce of this port."

This objection should receive thoughtful consideration; the change if authorized will withdraw something over an acre from the surface area, but the present depth varies from one to fourteen feet, the greater portion showing less than eight feet over what is reported as hard material; it is now available for anchorage for light-draft vessels only, but can be deepened by dredging.

"Fourth. As to give Mr. Montgomery privileges which others have not asked through a jealous care for the best interests of the port and even at considerable expense to themselves, it hardly seems fair, although the dredging at the place under discussion
64 would probably be in a material harder than in most other localities."

The point made that if this is granted it will be a special privilege not requested by others, is hardly a good one; if others had made similar applications they surely would have expected and demanded courteous consideration of their requests.

"Fifth. The increase in the area of Mr. Montgomery's wharf brings up the point that if one holder of water-front property is allowed such substantial advantages, others might justly advance similar claims."

This point is important and should be carefully considered; if other parties presented similar requests under similar conditions they would receive prompt consideration; in this specific case the owner finds the harbor line running across a bed of hard material which has defied the erosive power of the current during freshets; to avoid the expense of removing about 22,000 cubic yards he asks that the harbor line be thrown forward about eighty-five feet at one point, running back to its original location at points about 700 feet distant on each side; to comply with his request reduces the distance between harbor lines on opposite side of the river to about 1,000 feet; less than a mile above the river is only 600 feet wide and is spanned by a bridge resting on piers; the slight contraction now asked cannot throttle the freshets or do any material damage.

In an engineering point of view and in the immediate or future interests of commerce I cannot believe that any material damage will result from granting this request.

The application of Mr. Montgomery is backed by such
65 citizens as Mr. Henry Failing, Senator McBride, who writes in his own name, and that of Representatives Ellis and Tongue, Mr. Raleigh Stott, Mr. W. F. Burrell, Messrs. C. H. and D. Raffety, Messrs. Inman, Poulsen & Co., Wells, Fargo & Co. (by Mr. R. M. Dooley), and Mr. J. M. Strowbridge. Mr. A. L. Mohler, president of the Oregon Railway & Navigation Company, incloses a letter from the chief engineer of the company, who states he can see no objection whatever to granting Mr. Montgomery's request.

The request receives strong opposition from the Portland chamber of commerce through Mr. H. R. Lewis, secretary; from Mr. L. A. Lewis in behalf of Mrs. C. F. Lewis; from Mr. A. F. Wheeler; from

Mr. C. E. Ladd, executor of the estate of the late W. S. Ladd; from the Pacific Coast Elevator Company and from a number of citizens, including the firm of Allen & Lewis by L. A. Lewis, Mr. J. McCraken and others who have signed a protest against changing the harbor lines.

After a careful study of the subject I see no objection to granting this request other than the establishment of a precedent upon which other applications may hereafter be based; this, in my opinion, is an important objection for the consideration of the Secretary of War.

Mr. Montgomery requests that the Secretary of War will not take final action in this matter until he can have an opportunity to be heard before him.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

And subsequently on September 23, 1898, G. D. Meiklejohn, acting Secretary of War, took action thereon, by the following endorsement of the papers in the case:

"9th indorsement.

WAR DEPARTMENT, *September* 23, 1898.

66 In accordance with the views of the Chief of Engineers, the request of Mr. James B. Montgomery will be complied with.

G. D. MEIKLEJOHN,
Acting Secretary of War."

And also on the same day making the following endorsement upon the said map hereinbefore described and a copy of which is "Exhibit A," attached to the answer herein:

"WAR DEPARTMENT, *September* 23, 1898.

The change in harbor line shown in red hereon is approved.

G. D. MEIKLEJOHN,
Acting Secretary of War."

The court finds that the red line referred to in the foregoing statement of the acting Secretary of War is the identical line described in the application of the defendant Montgomery for the change of the harbor line, as amended by him at the request of Major Fisk, corps of engineers, U. S. A., August 17, 1898.

Eighth. That by the action of the acting Secretary of War of September 23, 1898, aforesaid, the said harbor line was re-established and relocated by the Secretary of War, between Randolph and Russell streets extended, on a line formed by an extension to an intersection in front of the defendant Montgomery's said property of the harbor line established August 9, 1892, in front of the present "Montgomery dock" and in front of the "Northern Pacific Terminal Company's dock" as designated and described on said map

"Exhibit A" and by the red line thereon, that being the identic
line described in the application of defendant Montgome
67 as amended August 17, 1898, in response to the written
quest of Major W. L. Fisk, major, corps engineers, U. S.
as aforesaid.

Ninth. That prior to the commencement of this suit, but subs
quent to September 23, 1898, the defendant James B. Montgome
began the construction of a wharf by the driving of piles partly ou
side of the harbor line established by the Secretary of War Augu
9, 1892, but wholly inside of the line as relocated by the Secreta
of War September 23, 1898, and as described by said red line
said map "Exhibit A" attached to the answer herein.

Tenth. That on or about the 2d day of November, 1898, the boa
of commissioners of the Port of Portland at a meeting duly call
and held, adopted the following preamble and resolution:

"Whereas, the wharf line heretofore, and prior to the 1st day
July, 1898, established by the United States engineers, curtails t
navigable waters of the Willamette river at the city of Portland
the full extent which may be done in the interest of the shippi
interests of this port; and

"Whereas, in order to provide sufficient space and width of cha
nel to accommodate the fast-increasing shipping interests of th
port it will be necessary to, in the near future, so improve the cha
nel of the said river at Portland and within the limits of this po
as to make it twenty-five feet in depth within the entire limits
said port, and from the steel bridge crossing said river in the city
Portland, now used by the various railroads entering the said ci
of Portland, to the south end of Swan island and to its full width
between said wharf lines so established as aforesaid; and
68 "Whereas, to allow any wharves to be extended into sa
river in this port and within the limits of the city of Po
land, beyond the wharf line aforesaid, will be of great and lasti
damage to this port and to the shipping interests thereof; no
therefore, be it

"Resolved, That the wharf line of this port and at the city
Portland and on both sides of the Willamette river be and the sa
is hereby established and fixed as the same as that heretofore a
prior to the 1st day of July, 1898, established by the United Stat
engineers, until the further action of this port.

"Whereas, one J. B. Montgomery and those in his employ or a
ing under him is now engaged in or intends to construct a wha
on property owned by him, situate in what was at one time the ci
of Albina, and extending beyond said wharf line; therefore, be it

"Resolved, That the said J. B. Montgomery and those acting und
him be notified to cease the construction of said wharf beyond sa
wharf line aforesaid, and to at once remove any piling or other o
struction which he may have placed in the river in front of his sa
property and beyond said wharf line, and that if he shall fail to
so at once that the executive committee be instructed to take su
steps as may be necessary, by legal proceedings or otherwise,
secure the object aforesaid."

That prior to the commencement of this suit and on or about the 3d day of November, 1898, a copy of said preamble and resolutions was served upon the defendant James B. Montgomery, and also upon the person having charge of the work in the construction of said wharf, accompanied by a communication, of which the following is a copy:

69 "SIR: You and each of you are hereby notified that the Port of Portland, at a meeting duly and regularly held on Wednesday, the 2d day of November, 1898, passed the resolutions herewith, and that you were thereby and are required to cease driving any piles or placing any obstructions of any kind in the Willamette river beyond the wharf line established by the United States engineers prior to July 1, 1898, in front of the property owned by J. B. Montgomery, and situate in what was formerly known as the city of Albina, and on which he is now constructing or causing to be constructed a wharf, and that you are required to remove from said river any piling or other obstruction from said river in front of said property and beyond said wharf line which you may have previously placed therein.

By order of the Port of Portland.

J. McCRAKEN, *President.*
J. A. BROWN, *Secretary.*"

Eleven. That on or about the 23d day of November, 1898, at a meeting of the board of commissioners of the said Port of Portland, duly called and held, the following resolution was passed:

"Whereas, on the 9th day of August, 1892, the United States engineers established a wharf line in the Willamette river within the city of Portland, Oregon; and

"Whereas, said wharf line has been adopted and established by said city and also by the Port of Portland; and

"Whereas, J. B. Montgomery is now engaged in the construction of a wharf in said river outside of said line; therefore, be it

70 "Resolved, by the board of commissioners of the Port of Portland, That in our judgment, and we do hereby declare and decide, that the observance of said wharf line in the construction of wharves is necessary for a good and sufficient width of channel in said river within said city, and that the construction of said wharf which said Montgomery proposes to extend eighty-five feet into said river beyond said wharf line, will be an obstruction to our work in making and maintaining said width of channel; and, further, it is our judgment that said wharf when constructed as proposed by said Montgomery will interfere with the navigation of said river by creating shoal places in its now navigable waters, and will interfere with and obstruct our work in making and maintaining a channel in said river twenty-five feet in depth, as provided for in the act incorporating the Port of Portland."

Twelfth. That ordinance numbered 9071 of the city of Portland, provides as follows:

"Vessels arriving within the corporate limits of the city of Port-

land, if obliged to anchor, shall be anchored below the Albina ferry and on the west side of the main ship channel."

Thirteenth. That the Willamette river is within the limits of the city of Portland, a river wholly within the State of Oregon, and is within and below said city and connecting with the Pacific ocean, navigable for ocean vessels, and is one of the navigable waterways of the United States within the meaning of those terms as used in the said act of September 19, 1890, known as the river and harbor act and hereinbefore set out and referred to in the second finding herein, and that the tide ebbs and flows in said river within the limits of the said city of Portland.

71 Fourteenth. That the harbor of the city of Portland belongs to that class of harbors in the navigable waters of the United States referred to in section 12 of the act of Congress of September 19, 1890, aforesaid, and in which the Secretary of War was, by said act of Congress, authorized to cause the establishment of harbor lines.

Fifteenth. That the defendant James B. Montgomery has not driven any piles, or placed any other obstruction whatever in said river, outside of the harbor lines as relocated and established by the Secretary of War on the 23d day of September, 1898, as described by said red line on said map "Exhibit A" attached to the answer herein, but has, since September 23, 1898, driven piles in part construction of his wharf outside of the harbor line as established by the Secretary of War on August 9, 1892, and all in front of real estate fronting on said Willamette river of which he was and is the owner.

Sixteenth. That on October 7, 1898, the defendant James B. Montgomery was officially notified by W. L. Fisk, major, corps engineers, U. S. A., of the relocation of the harbor line in the harbor of Portland, Oregon, as requested by him in his petition of May 21, 1898, by a communication of which the following is a copy:

"United States engineers' office.

PORTLAND, OREGON, *October* 7, 1898.

Mr. J. B. Montgomery, city.

SIR: I am requested by the Chief of Engineers to advise you that the relocation of the wharf line in the harbor of Portland, Oregon, requested in your petition dated May 21, 1898, namely, the

72 extension to an intersection in front of your property, of the harbor lines heretofore established in front of the present 'Montgomery dock' and in front of the 'Northern Pacific Terminal Co.'s dock' has been approved by the War Department.

Very respectfully, W. L. FISK,

Major Corps Engineers, U. S. A."

Conclusions of Law.

As conclusions of law from the foregoing findings of fact the court holds:

First. That the harbor line as caused to be re-established and relocated by the Secretary of War on the 23d day of September, 1898, in

the city of Portland, Multnomah county, State of Oregon, in front of the property owned by the defendant James B. Montgomery, and as indicated by the red line on the map "Exhibit A" attached to the answer herein, which line is designated and described to be a line formed by an extension to an intersection in front of the defendant Montgomery's said property of the harbor line established August 9, 1892, in front of the present "Montgomery dock" and in front of the "Northern Pacific Terminal Co.'s dock," was legally so established on September 23, 1898, and is the only proper or legal harbor line at said point in said harbor.

Second. That the defendant James B. Montgomery in driving piles and in constructing his wharf outside of and beyond the harbor line caused to be established by the Secretary of War on the 9th day of August, 1892, and inside of such harbor line as caused to be relocated and re-established by the Secretary of War on the 23d
73 day of September, 1898, does not in any manner or in any respect unlawfully interfere with the navigable waters of the Willamette river, or with the harbor of the port of Portland, or with the navigation or other use of either thereof for purposes of navigation and commerce, nor does the same in any manner or to any extent interfere with any lawful right upon the part of either the Port of Portland or the City of Portland to improve the navigation of said river and harbor.

Third. That neither the Port of Portland nor the City of Portland has any right to complain of the action of the defendant James B. Montgomery in driving piles and constructing his wharf outside of and beyond the harbor line caused to be established by the Secretary of War on the 9th day of August, 1892, and inside of the harbor line so relocated and re-established by the Secretary of War on the 23d day of September, 1898, and that neither The City of Portland nor The Port of Portland, plaintiffs herein, has any jurisdiction or right to restrain the construction thereof or to establish any harbor or wharf lines which in any manner conflict with the said harbor line so caused to be relocated and re-established by the Secretary of War on September 23, 1898, as aforesaid.

Fourth. That the complaint of the plaintiffs herein be dismissed, and that the defendant have judgment and decree against the plaintiffs for his costs and disbursements to be taxed.

JOHN B. CLELAND, *Judge.*

Therefore, in accordance with the foregoing findings of fact and conclusions of law, it is ordered, adjudged and decreed by
74 the court that the bill of complaint of the plaintiffs filed herein by the City of Portland and the Port of Portland be and the same is hereby dismissed, and the defendant James B. Montgomery have and recover of and from the plaintiffs his costs and disbursements taxed at $—, and that execution issue therefor.

JOHN B. CLELAND, *Judge.*

Assignment of Errors.

Appellants herein say there is manifest error on the face of the record in this:

1. The court below erred in overruling appellants' motion to strike out parts of respondent's answer.

2. Said court erred in overruling appellants' demurrer to respondent's answer.

3. Said court erred in holding that section 12 of the act of Congress of 1890 (27 Rev. Statutes, 88), is constitutional.

4. Said court erred in holding that the Secretary of War had any right in 1898 to change harbor lines that were established in 1892.

5. Said court erred in holding that the facts as they appeared in the pleadings and evidence gave the Secretary of War or G. D. Meiklejohn any jurisdiction to fix or interfere with the harbor lines within the city of Portland.

6. Said court erred in holding that respondent had any right to drive piles or extend his wharf beyond the wharf line established by the city of Portland.

7. Said court erred in holding that the Port of Portland had no right to interfere with or control the driving of piles or the building of a wharf by respondent in the Willamette river.

75 8. Said court erred in its first conclusion of law in holding that the red line indicated on the map, "Exhibit A," was legally established and is the only proper or legal harbor line at the point indicated in said conclusion of law.

9. The court erred in its second conclusion of law in each and every particular as therein stated.

10. The court erred in its third conclusion of law in each and every particular as therein stated.

11. The court erred in dismissing appellants' complaint and awarding the costs and disbursements against them.

WILLIAMS, WOOD & LINTHICUM AND
J. M. LONG, *Attorneys for Appellants.*

It is agreed this March 3rd, 1899, that this "*Appellants' abstract of record*" shall be considered and treated in the supreme court as a transcript of the record in the case, and the filing of any other or further transcript is hereby waived.

STOTT, BOISE & STOUT AND
MITCHELL & TANNER,
Attorneys for Respondent.
WILLIAMS, WOOD & LINTHICUM,
Att'ys for Plaintiff.

76 In the Supreme Court of the State of Oregon, October Term, 1898.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
v.
J. B. MONTGOMERY, Defendant and Respondent.

Appeal from the judgment of the circuit court for Multnomah county, Hon. John B. Cleland, judge.

Brief for Appellants.

Williams, Wood & Linthicum and J. M. Long, attorneys for appellants.

Stott, Boise & Stout and Mitchell & Tanner, attorneys for respondent.

Filed Mar. 23, 1899.

J. J. MURPHY, *Clerk.*

77 In the Supreme Court of the State of Oregon, October Term, 1898.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
v.
J. B. MONTGOMERY, Defendant and Respondent.

BRIEF FOR APPELLANTS.

Points and Authorities.

I.

Sect. 12 of the act of Congress of 1890 (27 Rev. Stats. 88) is unconstitutional.

Art. X, amendments to the Constitution; United States *v.* Keokuk & H. Bridge Co., 45 Fed. Rep. 178; United States *v.* Rider, 50 Fed. Rep. 406; County of Mobile *v.* Kimball,
78 102 U. S. 699, 702; Gilman *v.* Philadelphia, 3 Wall. 725; Willamette Bridge Co. *v.* Hatch, 125 U. S. 1; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; United States *v.* Bailey, 1 McLean, 240; Mining Debris cases, 9 Sawyer, 497.

II.

The Secretary of War had no right to change or relocate established harbor lines.

III.

The pleadings and evidence show affirmatively that the Secretary of War had no jurisdiction to change the established harbor lines of Portland.

Cooley Const. Lim., sect. 406, and cases cited; New Jersey R. R. & Tr. Co. *v.* Suydam, 17 N. J. L. 30.

IV.

Respondent had no right to drive piles or extend his wharf beyond the wharf lines established by the City of Portland.

Lake Shore & Michigan R. R. Co. *v.* Ohio, 165 U. S. 365.

V.

To regulate the driving of piles or the building of wharves within the harbor of Portland is within the police powers of the city.

City of Dubuque *v.* Stone, 32 Iowa, 84; Beamen case, 45 Fed. Rep. 129; Gray *v.* Frazer, 21 How. 187; Hunt *v.* Mayor, 9 Wend. 570; Vanderbilt *v.* Adams, 7 Cowen, 348; City of New York *v.* Milne, 11 Peters, 132, 138; License cases, 5 How. 574; Cooley *v.* Wardens, 12 Wheat. 319; Crandall *v.* Nevada, 6 Wallace, 42; Munn *v.* Illinois, 94 U. S. 113; Thorpe *v.* R. R. Co., 27 Ver. 149; Boston & M. R. Co. *v.* Commissioners, 79 Maine, 386.

79 VI.

Said sect. 12 did not exclude the jurisdiction of the State inside the harbor lines fixed by the Secretary in 1898.

Veazie *v.* Moore, 14 How. 574.

VII.

Respondent's right to build a wharf is subject to the provisions of sects. 4227 and 4228 of the Code.

Gould on Waters, sect. 179; Illinois Central R. R. Co. *v.* State, 146 U. S. 387; Commonwealth *v.* Alger, 61 Mass. 53.

VIII.

The decision of the Port of Portland is binding upon respondent.

Amer. & Eng. Enc. of Law, p. 1046, and cases cited; Dillon on Mun. Corp., sects. 832, 836.

XI.

The Port of Portland has the right to regulate the driving of piles or the building of wharves inside of the harbor lines fixed by the Secretary in 1898.

People *v.* Williams, 64 Cal. 499.

Argument.

Sect. 8 of the Constitution of the United States confers upon Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." Sect. 12 of the act of Congress of 1890 (27 Statutes, 88), under which the questions in this case arise, provides as follows:

"Where it is made manifest to the Secretary of War that
80 the establishment of harbor lines is essential to the preservation and protection of harbors, he may and is hereby authorized to cause such lines to be established beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding one year, at the discretion of the court, for such offense."

The charter of the city of Portland, among other powers thereby conferred upon the common council of said city, provides that said common council "shall have power to regulate the building of wharves and the driving of piles in the Willamette and Columbia rivers within the limits of said city and to establish a line beyond which wharves shall not be built or piles driven," and said provision has been in force since February 19, 1891.

On the 9th day of August, 1892, a board of United States engineers surveyed wharf lines in the Willamette river within the city of Portland; and on the 12th day of December, 1892, the common council duly passed an ordinance, No. 7995, by which the wharf lines so surveyed by said board of engineers were adopted and made the wharf lines of the city of Portland. Sect. 3 of said ordinance provides as follows: "All wharves or other structures hereafter built or erected on the river front on the east side of the Willamette river shall not extend westerly beyond the line laid down in sect. 1 of this ordinance, and all permits hereafter granted by the common council for the driving of piles or erection of structures shall conform to said line."

81 Said common council duly passed another ordinance, No. 9071, which provides: "Vessels arriving within the corporate limits of the city of Portland, if obliged to anchor, shall be anchored below the Albina ferry and on the west side of the main channel."

Defendant Montgomery is now engaged in driving piles and constructing a wharf below and near the Albina ferry, which, if completed, will extend into the Willamette river within the harbor of Portland about eighty-five feet beyond the wharf lines established by said ordinance, and will occupy about 30,000 square feet of the river outside of said lines. He claims the right to drive piles and construct his wharf in violation of said ordinance of the city of Portland, under and by virtue of certain proceedings in the War Department at Washington, which are fully set forth in the sixth and seventh findings of the court below and the map attached to the answer.

I.

Our contention is that the Constitution does not confer upon Congress the right to delegate to the Secretary of War the power to establish harbor lines as provided in said section of the act of 1890. Article X of the amendments to the Constitution provides: "The

powers not *delegated* to the United States by the Constitution, nor prohibited by it to the States, are respectively to the States respectively, or to the people." Congress, therefore, in all of its acts of legislation, exercises a *delegated* power; and *delegatus non potest delegare* is a settled maxim of the law. Now, to fix the harbor lines of the ports of the United States is a regulation of commerce, or it is not. If it is, then the power so to do is exclusively vested in Congress. If
82 it is not, then the City of Portland has an indisputable right to say where the wharf lines in its harbor shall be.

We do not deny that Congress may devolve upon an executive officer administrative or ministerial duties; but if the fixing of wharf lines in the harbor of Portland is a regulation of commerce, then it is as much a legislative function as the enactment of quarantine inspection and other laws of a like nature. To determine whether or not a harbor line "is essential to the preservation and protection of a harbor" is certainly not a ministerial or executive duty, because it requires a deliberate judgment upon a variety of considerations which ordinarily enter into legislative action. Assuming the fixing of harbor lines to be a regulation of commerce, it necessarily follows that if this regulation of commerce can be ceded by Congress to the Secretary of War, all the other regulations of commerce can be in the same way transferred to him, and he, instead of Congress, become invested with the right to regulate commerce between the several States and with foreign nations.

We think the distinction between what is legislative and what is administrative is clearly defined by the U. S. Supreme Court in Miller *v.* New York, 109 U. S. 385, in which the court says: "The efficiency of an act as a declaration of legislative will, must of course come from Congress; but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate."

In the case of United States *v.* Keokuk & H. Bridge Co., 45 Fed. Rep. 178, it was decided that Congress had no power to confer upon the Secretary of War the right to change a bridge that had been erected with the consent of Congress. The court says:
83 "Where, however, it becomes necessary to decide whether the public interests demand that the navigation of a river shall be subjected to some burden and obstruction in order that the other public highways of the country may be carried over the same by means of bridges, and to prescribe the nature and extent of the obstruction that may be caused to the navigation of the given waterway, *there are presented legislative questions the decision of which cannot be conferred upon any individual, citizen or subordinate authority.*"

In United States *v.* Rider, 50 Fed. Rep. 106, the syllabus is as follows: "Act of Congress Aug. 11, 1888, 25 U. S. Statutes, 424, providing that when the Secretary of War shall have reason to believe that any bridge is an obstruction to free navigation, he shall give notice requiring the bridge to be so altered as to render navigation through or under it easy and unobstructed, and imposing a penalty on the controllers of the bridge for failing to make such provision,

is unconstitutional in that it delegates to the Secretary of War powers exclusively vested in Congress."

According to the decision of the courts and the practice of the Government, Congress cannot delegate to the Secretary of War the authority to construct, according to his judgment, bridges over the navigable waters of the United States, though the details of their construction may be committed to him. The argument *ab inconvenienti* cannot avail the defendant, as this is purely a question as to the construction of the Constitution; but if the erection of bridges over the waters of a State can be safely left to the States, as it is by Congress, subject to the approval of the Secretary of War, why may not the establishment of wharf lines in waters exclu-
84 sively within a State be safely left to the States, subject to the approval of the Secretary of War?

We cannot believe that the framers of the Constitution intended that the location and construction of wharves in the ports of New York, Baltimore and New Orleans and all the other commercial cities of the United States should be absolutely and exclusively in the hands of any individual official of the Government.

Mr. Justice Swayne, delivering the opinion of the court, in Gilman *v.* Philadelphia, 3 Wallace, 726, says: "The power to regulate commerce covers a wide field and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities and limited in their operation to such localities. *To this extent the power to regulate commerce may be exercised by the States.*"

Justice Field, referring to the above language, says, in County of Mobile *v.* Kimball, 102 U. S. 691: "This doctrine was subsequently recognized in the case of Welten *v.* Missouri, 91 U. S. 275, and Henderson *v.* Mayor, 92 U. S. 259, and in numerous other cases; and it may be considered as expressing the final judgment of this court."

We submit that the construction of wharves in the different harbors of the United States cannot, in the nature of things, be the subject of uniform rules; because the character of each wharf must be determined by the varying circumstances of the locality in which it is situated. This is a power that remains with the States, concurrently, at least, with the Federal Government.

85 II.

Assuming for the purpose of this point that sect. 12 of the act of 1890 is constitutional, we submit that by a fair construction of its language the Secretary of War is not empowered to change or relocate harbor lines that have once been duly and legally established. The language used is as follows: "*Where it is made manifest to the Secretary* of War that the *establishment* of harbor lines is essential to the preservation and protection of harbors, he may cause such lines to be established," etc.

Does not the word "establishment" in this connection necessarily refer to an inceptive or original act? Does it not necessarily imply the absence of what is to be established? How can a thing be es-

tablished that has been already established? Does not the language of this section clearly imply that there must be an existing necessity for action by the Secretary as to a harbor, arising out of the fact that such harbor is not protected by harbor lines? There was no such necessity as to the harbor in Portland, for that harbor has been preserved for many years, and fully protected by harbor lines established by the Secretary of War. The commerce of the country is broadening and new harbors are constantly coming into use; and it was as to such harbors the Secretary was empowered to act. Harbor lines were established long ago in New York, Boston, Baltimore and all our great commercial cities, and millions of dollars have been invested in wharves and warehouses with reference to these lines. Can it be supposed that Congress intended to confer upon the Secretary of War an unlimited discretion to change or relocate these lines? What was the mischief said sect. 12 was in-
86 tended to prevent? Clearly, to protect a harbor that was not protected. One rule for the construction of a statute is that its meaning should not be extended beyond the mischief which it seeks to remedy or prevent. All the wharves in Portland, and they are many, conform to the harbor lines established by the Secretary of War in 1892; and it cannot be pretended that the relocation of these lines was necessary for the preservation or protection of the harbor.

III.

Assuming also, for the purposes of this point, that said sect. 12 is constitutional, we contend that the Secretary of War had no jurisdiction to relocate the harbor lines in the city of Portland. Chief Justice Hornblower says, in New Jersey R. R. Co. *v.* Suydam, 17 N. J. L. 30: "The rule I apprehend to be clear and well settled that persons exercising a special delegated authority must show upon the face of their proceedings that they have acted within their prescribed limits." This is elementary law. Let us apply this law to the facts of this case.

Power is given to the Secretary of War to establish harbor lines where it is made manifest to him that such harbor lines are essential to the preservation and protection of a harbor. Whatever else may be said about said sect. 12, it is absolutely clear that the action of the Secretary under said section is to be governed by public considerations. Whenever a Secretary of War undertakes to set aside the action of his predecessor and override the laws of a State, there must be, to make his proceedings valid, an affirmative showing that he has acted within the prescribed limits of his authority.

Counsel will of course say that it is to be presumed that
87 the Secretary acted within the limits of his power. But there can be no such presumption in this case, if there could be in any; for the entire record of the proceedings as to this matter is before the court, and it shows conclusively that the Secretary did not establish any harbor lines because they were essential to the protection of the Portland harbor. On the contrary, it shows that the established harbor lines were changed exclusively to subserve the

personal and private interests of J. B. Montgomery. The seventh finding of fact clearly shows this. It says:

"This is a case of an application of Mr. J. B. Montgomery, of Portland, Oregon, for a change of the harbor lines at Portland from those ordered by the Secretary of War August 9, 1892, so as to admit of the construction of a dock, the outer limit of the extreme point of which will be about 85 feet in advance of the present harbor line. The object of Mr. Montgomery, as stated by him, is to avoid the necessity of the expense of dredging about 20,000 cubic yards of hard material."

The only reason given for changing the harbor lines of 1892 is to save Mr. Montgomery some expense in constructing his dock. There is no pretense or intimation that any public considerations influenced the Secretary. And where these facts affirmatively appear, can it be said that the Secretary had any jurisdiction to make a change in the harbor lines? Is it possible that under the Constitution and laws of the United States the Secretary of War can make or change harbor lines to accommodate a personal or party friend?

Stress is laid upon the words, in said sect. 12, "except under such regulations as may be prescribed by him from time to time." Are the regulations here referred to regulations of commerce? If
88 they are, then we insist that this part of said section is unconstitutional. To regulate commerce between the several States is a function of Congress that cannot be transferred or delegated to any individual. Regulation implies a rule, and an act of government. The regulations referred to are to be "prescribed." To *prescribe* means to write beforehand. The word *regulations*, as here used, evidently means rules for the management of harbors, to be written out and published before they take effect.

IV.

We submit with great confidence that the right of the City of Portland to regulate the driving of piles and the building of wharves inside of the harbor lines, as fixed by the Secretary of War, is affirmed in effect by the Supreme Court of the United States in the case of Lake Shore & Michigan Railway *v.* Ohio, 165 U. S. 365.

Council in the court below cited numerous cases, commencing with Wilson *v.* Blackbird Creek Marsh Co., 2 Peters, 251, and coming down to Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 203, to show that whenever and wherever Congress has established regulations of commerce, a State has no right to interfere with these regulations. Now, it will be noticed that in these cases the court generally decided in favor of the claim set up under State authority, because there had been no legislation by Congress inconsistent with that authority; and, while what was said by the court as to the effect of future legislation by Congress is entitled to respectful consideration, it was all outside of the cases before the court, and clearly *obiter*.

Further, it will be noticed that the only case decided by the U. S.

Supreme Court since the Wilson case, 2 Peters, *supra*, as to
89 the effect of such legislation after it has been enacted is the said case in 165 U. S. That case is as follows: The railroad company had constructed a bridge across the Ashtabula river, which empties into Lake Erie, without any draw; and the bridge was therefore an obstruction to the navigation of that river. The State court of Ohio issued a mandate to the railroad company, commanding it to remove the bridge or construct an adequate draw-span therein. The railroad company took the same ground in that case that Montgomery takes in this; *i. e.*, that the State had no jurisdiction over the subject, because Congress had taken exclusive control of the construction and alteration of bridges. This claim was predicated upon sect. 4 of the act of Congress, 26 Statutes, 453, which reads as follows: "Whenever the Secretary of War shall have good reason to believe that any railroad or other *bridge now constructed* or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters, on account of insufficient height, width of span or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made and shall prescribe in each case a reasonable time in which to make them. If at the end
90 of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

The court, in the case just cited (165 U. S. 365), says: "The contention is that the statute in question manifests the purpose of Congress to deprive the several States of all authority to control and regulate any and every structure over all navigable streams, although they be wholly situated within their territory. That full power resides in the States as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the *contrary*, is conclusively determined. Wilson *v.* Marsh Co., 2 Peters, 245; Withers *v.* Buckley, 20 How. 84; Cardwell *v.* Bridge Co., 113 U. S. 205; Bridge Co. *v.* Hatch, 125 U. S. 1; Shively *v.* Bowlby, 152 U. S. 1, and authorities there cited. Indeed, the argument at bar does not assail the rule settled by the foregoing cases, but asserts that as the power which it recognizes as existing in the States is predicated solely upon the failure of Congress to exert its paramount authority, therefore the rule no longer obtains, since the act of 1890 relied on substantially amounts to an express assumption by Congress of entire control over all and every navigable stream, whether or not situated wholly within a State."

Now, this position of the railroad company, as stated by the court, and which was overruled, is precisely the position taken by the respondent in this case; namely, that the act of 1890 amounts
91 to an express assumption by Congress of entire control over the Willamette river in Portland, to the exclusion of all State authority, as to the driving of piles or the construction of wharves. We submit that said sect. 4 is as much of an assumption of exclusive control over existing bridges as sect. 12 is over existing harbors.

The sum and substance of the argument on the other side is this: The State of Oregon had jurisdiction over the building of wharves in the harbor of Portland before Congress acted upon the subject; but Congress having acted by the act of 1890, the jurisdiction of the State is extinguished. We submit that this argument has been expressly overruled by the Ohio case, *supra*. Congress laid down the rule for the alteration of existing bridges. Notice was to be given, the parties were to have time, and the directions as to what was to be done were clear and specific; but the court held that all this did not exclude the jurisdiction of the State.

The Supreme Court further says: "The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification, so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges; nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end." Now, if sect. 4 does not give the Secretary the right to authorize the construction of a bridge, how can sect. 12 be construed to authorize the construction of a wharf? All of the sections of the act of 1890, taken together, show that the whole scope and spirit of the
92 act is to prevent and remove obstructions to navigation. It may be that the power to do this can be conferred upon the Secretary; but any construction of said act which gives to the Secretary the power to originate acts for the construction of bridges, dams or wharves, or other structures of like nature, is not only contrary to the object of said act, but unconstitutional. The court will notice the doubt expressed upon this point in 165 U. S. 365. The Supreme Court recognizes the jurisdiction and right of the State to prevent or remove obstructions from a navigable river wholly within its borders, and holds that congressional legislation for that purpose is merely cumulative. That is to say, the jurisdictions of the State and the General Government are concurrent. There is nothing extraordinary about this. They are concurrent as to pilotage, inspection, quarantine and other similar laws for the protection of ships, shippers and sailors. Congress has jurisdiction over railroads under the interstate-commerce act, and the States through which they run have also jurisdiction over the same roads.

Counsel for respondent, in his printed brief in the court below, argues as follows: "I do not claim by any means, nor is it necessary, at least as far as this case is concerned, that Congress has any power under the commercial clause to authorize the Secretary of

War to determine as to the size, length, height, or character of any wharf or warehouse within the city of Portland constructed on land bordering on the Willamette river. My claim is this: That Congress has the power under the commercial clause to authorize the Secretary of War to establish, locate and fix a certain harbor line on either side of the harbor at Portland, up to which wharves
93 piers, warehouses and other commercial aids may be constructed, and beyond which it shall not be lawful, without the consent of Congress or the Secretary of War, representing Congress, upon the part of the State or any corporation or municipality authorized by the State, or any individual person, company, association or corporation, to construct or build any wharf, pier or warehouse of any kind whatever."

Now, if the Secretary of War has no authority to determine the size, length, height or character of Mr. Montgomery's wharf, who has that authority? It seems to us that such authority must exist somewhere; and if not in the General Government, it must be in the State. All that the State proposes to do in this case is to determine the length of the respondent's wharf.

Whatever else may be said of the foregoing argument of the eminent counsel, it is clear that it contains one palpable *non sequitur*, in its statement that wharves may be constructed up to the harbor line. This "may be" is not found in any law. On the contrary, such wharves are expressly prohibited by the law of the State. So that the argument is at once resolved into this,—Has the State a right to regulate the construction of wharves in the harbor of Portland? The State does not wish to prevent the construction of a wharf by Mr. Montgomery. All that it proposes to do is to regulate the size of his wharf, so that its river front shall conform to the other wharves in the city. We submit that this is a reasonable and just regulation.

In People *v.* Williams, 64 Cal. 499, the court says: "The mere establishment of a harbor line does not deprive the State of the right to regulate and control the navigable waters within that line."

94 V.

We claim that the right to regulate the driving of piles in the Willamette river in the city of Portland is within the police power of the city. There must be a line somewhere separating the police power of a State from the power of the General Government; and there must be some rights in the State which Congress is bound to respect. It must be admitted that there is a mass of powers which the States have not ceded to the General Government; and among these are the police powers of the States. All that Montgomery took under the action of the Secretary, whatever it was, he took subject to these powers, if they apply to the case at bar.

The case of City of New York *v.* Miln, 11 Peters, 102, is instructive upon this point. Let us see, says the court, what powers are left to the States. "The Federalist, in the 45th number, speaking of this subject, says the powers reserved to the several States will extend to all objects which in the ordinary course of affairs concern

the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State." In the case of Gray *v.* Frazer, 21 How. 187, two ordinances of the city of Charleston, regulating the conduct of ships in its harbor, were attacked. The court says: "The power of the authorities to pass these ordinances is disputed by libellants. But regulations of this kind are necessary and indispensable in every commercial port for the convenience and safety of commerce, and the local authorities have a right to prescribe at what wharf a vessel may lie and how long she may remain there, where she may unload or take on
95 board particular cargoes, where she may anchor in the harbor and for what time, and what description of light she shall display at night to warn passing vessels of her position and that she is at anchor and not under sail." Can there be any doubt that the City of Portland possesses all these powers?

In the case of Hart *v.* Mayor, 9 Wend. 570, it was held that an ordinance of the city of Albany to prevent obstruction of the Hudson river by docks and slips, in said city, was within its police power.

In the case of The W. H. Beamen, 45 Fed. Rep. 129, the court says, as to a law of the State of New York requiring vessels to keep in the middle of the East river: "It is clearly within the well-defined limits of the police power of the State, and is valid and obligatory in its nature, as it is beneficial in its character."

In the case of City of Dubuque *v.* Stout, 32 Iowa, 84, the court says: "As in the case of public markets, the grant of power to establish wharves and regulate the stationary anchorage and moorings of all boats and rafts necessarily confers the authority to fix the location and limits of the wharves and landings and to prohibit the use of any other place for that purpose." And the court further says: "Police regulations of this character are uniformly held legal and binding, because they are for the general benefit and do not proceed to the length of impairing any private right. The sovereign power in a community may prescribe the manner of exercising individual rights over property. They may prohibit the erection of wooden buildings, the keeping of gunpowder and other danger-
ous combustibles for sale within the city in greater than
96 specified quantities, fix market places and regulate the times when they shall be open, and prohibit the sale of market produce at other places; and on the same principles and for the same reasons may *establish and regulate wharves and landings*, regulate the anchorage of all boats, rafts or other vessels landing within its limits, and, as a necessary incident to this power, may prohibit the landing of such boats and rafts at any other place or places than as prescribed in the ordinances or laws made for that purpose."

Justice Field, in Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196 says: "The State may prescribe regulations for the government of vessels while in its harbors; it may provide for their anchorage or mooring so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their

passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the right and duty of the supreme power of the State to provide for the safety, convenient use and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for the facilities thus furnished vessels. Vanderbilt *v.* Adams, 7 Cow. 351."

97 But it is argued that the City of Portland has no right to establish harbor lines where such lines have been established by the Secretary of War. Admitting, for the sake of the argument, that the city has no such right *eo nomine*, that is not the question in this case. Harbor lines and wharf lines are not necessarily identical. Has the city a right to regulate the driving of piles or the construction and use of wharves in its harbor? The harbor lines established in 1892 by the Secretary of War were adopted by the common council of Portland as the wharf lines of the city as a matter of convenience and to save the expense of another survey. It is quite probable that the primary object in fixing a line beyond which piles should not be driven is to protect the channel and preserve a harbor wide enough for the commerce of the city; but there are many other reasons why the power to control the driving of piles should rest with the city authorities. The driving of piles in certain localities might interfere with the use of a ferry or bridge, or a street; or they might divert or shoal the channel or increase the danger to property in time of flood, or seriously damage public or private wharves; and many other reasons may exist why the city government should not be deprived of this power.

What we claim is that the State of Oregon can invest the City of Portland with the right of self-preservation; and that this right embraces the right to protect it harbor and commerce from destruction, as well as the health and morals of its inhabitants.

98 VI.

We deny that a limitation upon the driving of piles or the building of wharves by the city authorities in the harbor of Portland interferes with the regulation of commerce by the General Government. Congress is not empowered by the Constitution to regulate commerce, but "to regulate commerce with foreign nations and among the several States." Here is a restriction upon the power of Congress beyond which it cannot go.

Mr. Justice Daniel, in Veazie *v.* Moor, 14 How. 574, defines this power as follows: "The design and object of that power, as evidenced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent

unjust and invidious distinctions which local jealousies or local and partial interests might be disposed to introduce and maintain."

How does an ordinance of the city of Portland, declaring that piles shall not be driven in the river outside of a certain line, disturb the equality of the States? Does such a line discriminate in favor of one and against another State? Incidentally, of course, wharves affect commerce; and so do warehouses, elevators, railroads, canals and all other public modes of travel and transportation, all of which are within the exclusive jurisdiction of the States in which they are situate, excepting in so far as they discriminate between the States or injuriously affect foreign commerce.

Portland says, in effect, to Mr. Montgomery, one of its citizens: "You shall not extend your wharf into the harbor of the city any further than other citizens are allowed to extend their wharves; you shall have the same rights that other citizens have, and none other." What is there in this to interfere with the congressional power of regulating commerce between the several States and with foreign nations? What difference does it make whether a
99 wharf extends into the river 50, 75 or 100 feet, so long as the vessels of all the States and all countries have exactly the same rights in the harbor and as to the use of such wharf.

In connection with this branch of our discussion, we ask the special attention of the court to the words, in said sect. 12,—"beyond which no piers, wharves, bulkheads or other works shall be extended," etc. Assuming that the line fixed by the Secretary in 1898 is the rightful harbor line, the prohibition is that no structure shall be put in the river outside of that line. There is no prohibition as to what shall or shall not be done inside of that line. On the contrary, the implication is that all inside of the line is left to the owner of the shore and the State. Our position is that the jurisdiction of the State inside of this line has not been taken away by Congress. Before this court will nullify a law of this State upon the ground that it has been abolished by act of Congress, it must be clear that the one is repugnant to the other. The language in 165 U. S. 365, *supra*, is this: "That full power resides in the State as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise of Congress of authority *to the contrary*, is conclusively determined." Congress has not declared that the State may not regulate the driving of piles inside of the harbor lines established by the Secretary of War. Nor has it said, nor has the Secretary, that Montgomery *shall* build his wharf up to the red line on the map, which ruling would be necessary to overthrow the law of the State which says that *he shall not* build up to that line.

Giving to the act of the Secretary the most liberal con-
100 struction, and calling it a permission to Montgomery to build his wharf up to the red line, does that amount to anything more than saying that the Government is willing that he should extend his wharf to that line? Can Mr. Montgomery acquire a right, under such permission, to disregard the laws of the State in which he lives and in which the wharf is situated? There is no necessary

conflict between the act of the Secretary and the ordinance of the city. They both aim at the same end. They are both intended to protect the Harbor of Portland. We hold that the jurisdiction of the Secretary (if he has any) and the jurisdiction of the city over the entire harbor are concurrent. We admit, for the sake of the argument, that the city has no right to obstruct the river outside of the harbor lines fixed by the Secretary; but otherwise it has an absolute right to protect the channel of the river and fix the dimensions of its harbor according to its own judgment.

Does not the case in 165 U. S. clearly hold that if any one were to obstruct the river outside of the harbor lines, the State would have an equal right with the General Government to remove the obstruction? We think that sect. 7 of the act of 1890, 26 Statute 426, shows the correctness of our contention. It reads as follows: "It shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind *outside* established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river or other waters of the United States, in such manner as shall obstruct or impair the navigation, commerce or anchorage of such waters," etc., etc.

101 Now, we think that three things are clearly implied by this section:

1. That the prohibition is confined to the waters outside of harbor lines where harbor lines are established.

2. That no interference by the Secretary of War is contemplated as to State authorities or shore owners inside of said lines.

3. That States and individuals may do anything in navigable waters, inside or outside of harbor lines, or where there are no harbor lines, which does not "impair the navigation, commerce or anchorage of such waters." We maintain, however, that the Secretary of War has no power, and cannot be invested with any power, to authorize the construction of a bridge, dam or wharf in any of the navigable waters of the United States, or to exercise any other power which amounts to a regulation of commerce between the several States. What the Secretary might or might not do in a case differing from this it is needless to inquire; but we deny that by his mere *ipse dixit* he can set aside the laws of a State. Such a power is dangerous, arbitrary and unconstitutional; and any State that will not stand up for its rights against the exercise of such a power ought to go into "innocuous desuetude."

VII.

The act of 1862, sections 4227 and 4228, Hill's Code, provides that "the owner of any land in this State, lying upon any navigable stream or any like water and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same and extend such wharf or wharves

102 into such stream or other like water beyond low-water mark, so far as may be necessary and convenient for the use and

accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.

"SECT. 4228. The corporate authorities of the town wherein such wharf or wharves is proposed to be constructed shall have power to regulate the exercise of the privilege or the franchise herein granted; and upon the application of the person entitled to and desiring to construct such wharf or wharves, such corporate authorities shall, by ordinance or other like mode, prescribe the mode and line of low-water mark, so that such wharf shall not be constructed any farther into such stream or any water beyond such low-water line than may be necessary and convenient for the purpose expressed in sect. 4227, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water."

Mr. Montgomery took his right to build his wharf subject to the provisions of this statute. There is no way that he can divest himself of its limitations, because they are part of the franchise granted. We do not believe that the Secretary of War can wipe this statute out of existence with one stroke of his pen, or that Congress intended that he should have any such power.

There is no inconsistency between said sect. 12 and this statute. They can both be carried into effect. Sect. 12 provides for a harbor line outside of which no obstructions shall be placed in the river. The above statute provides for a wharf line outside of which no wharf shall be erected. Harbor lines and wharf lines are or
103 may be entirely distinct. Etymologically, a harbor is a place of shelter for ships where they may moor or ride at anchor. A wharf is a landing place for cargoes. Gould on Waters, sect. 179, in speaking of the right of riparian owners to build wharves, piers, etc., says: "Its exercise may be regulated or prohibited by the State; but so long as it is not prohibited, it is a private right, derived from a passive or implied license by the public."

Mr. Justice Field says, in the case of Illinois Central R. R. Co. *v.* The State, 146 U. S. 387, that a riparian proprietor holds his land "subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public."

VIII.

The material parts of the act incorporating the Port of Portland are contained in the fourth finding of fact. The purpose in creating said corporation was to make and maintain a ship channel at the city of Portland, and between that city and the sea, of good and sufficient width and having a depth at all points, at mean low water, both at said city and between said city and the sea, of not less than 25 feet. Sect. 3 of said act provides that, "so far as is necessary, requisite or convenient to carry out the said object, the said corporation shall have the full control of said rivers at said cities and between said cities and the sea, so far and to the full extent that this State can grant the same, and shall be and is hereby authorized to remove such obstructions therefrom and erect such works therein as may be found necessary or convenient in creating and maintaining the channel aforesaid."

Said finding farther says that "soon after the passage of
104 said act incorporating the Port of Portland, a copy of the same was transmitted by the president of said Port of Portland to the then Secretary of War, who approved the same; and that the work of the said Port of Portland in improving the Columbia and Willamette rivers has been conducted in conjunction with the United States engineers in charge of said rivers, acting under instructions from the Secretary of War, and said engineers have annually reported to said Secretary the nature and extent of said work by said Port of Portland."

We claim that these findings show that all the jurisdiction and power of the State over the Willamette river, including the harbor of Portland, is vested in said corporation, the Port of Portland, and that the Secretary of War has expressly consented that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment.

This court may take judicial notice, because it is a part of the public history of the State, that this Port of Portland has expended more than six hundred thousand dollars in the improvement of the Columbia and Willamette rivers,—all with the co-operation of United States engineers acting under instructions from the Secretary of War. Congress no doubt might interfere by direct legislation; but we deny that the Secretary can now revoke his consent and authorize any one to build a bridge, dam or wharf in the Willamette river that will impede or impair the work of said Port of Portland. We say that after the work of the Port of Portland has been going on for eight years with the acquiescence of Congress, the consent of the Secretary of War, and the authority of the
105 State, it has a right to prevent the erection of a pier, bulkhead, wharf or any other structure in the Willamette river that will obstruct its work in widening and deepening the channel of said river as contemplated by said act.

Let it be noticed that the Port of Portland does not propose to put anything in the river outside of the harbor lines. It only proposes to keep something out of the river inside of those lines. What reason can be given why it should not have this power, if in its judgment said something will prevent the improvement it is authorized to make? Can the court doubt that the Port of Portland has jurisdiction of that portion of the river which is within the harbor lines, to say nothing of what is outside of those lines? And if it has such jurisdiction, has it not a right to *prevent* that which it has a right to *remove?*

Counsel for respondent, in his printed brief in the court below, says: "That the State had certain powers in the premises I concede; and they are simply these, and no more. The State could authorize the Port of Portland, as a municipal corporation, to deepen and otherwise improve the navigation of the waters of the Willamette river at the city of Portland, and to determine what obstructions in said river it is necessary or convenient to remove in order to make and protect said channel within the harbor lines of such river at said city as are caused to be established from time to time by the Secre-

tary of War, in virtue of the authority conferred on him by the river and harbor act of September 19, 1890."

We understand this to be an admission that the State, through the Port of Portland, has the right to deepen and otherwise im-
106 prove the river between the harbor lines. If this is so, why has it not the power to deepen and otherwise improve the river between the harbor lines and the shore? On what principle or authority can it be said that the Federal and State jurisdictions are concurrent outside and the Federal jurisdiction exclusive inside of a harbor line? We think that if there is any exclusive jurisdiction inside of a harbor line, it is certainly in the State.

The Port of Portland has decided that the construction of the wharf, as proposed by Mr. Montgomery, will shoal the navigable waters of the river and obstruct its work in making and widening a channel as required by its act of incorporation; and this decision is conclusive upon him and upon all the citizens of Oregon. It is a reasonable decision, because it conforms to the decision of the board of engineers in 1892 and also to the decision of Major Fisk, the U. S. engineer now in charge of said river. And there is no appeal from it. It has the same force and is as binding as an act of the legislature to the same effect. The Port of Portland is a municipal corporation. Cook *v.* Port of Portland, 20 Oregon, 580. The law upon this subject is laid down in the Am. & Eng. Encycl. of Law, 1046, as follows: "The discretion of municipal corporations, within the sphere of their powers, is as wide as that possessed by the government of a State. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. Where, therefore, municipal corporations or their officers are acting within well-recognized powers, or exercising a discretionary power, the courts are wholly unwarranted in interfering, unless fraud is shown or the power or discretion is being manifestly abused to the
107 oppression of the citizen." And a great number of authorities are cited in support of this doctrine.

Mr. Montgomery applies for a change in the harbor lines of Portland. Major Fisk, who is on the ground and can judge from personal observation, reports against the change, after a patient hearing. Mr. Montgomery takes the papers, with some letters from his personal friends, and goes to Washington. He applies to the Chief of Engineers, who overrules some of the objections of Major Fisk, but does not recommend the change. Mr. Meiklejohn, the acting Secretary (who perhaps never saw the Willamette river), without giving the City of Portland or the Port of Portland or the chamber of commerce any chance for a hearing, makes the change.

Mr. Montgomery says that the change will save him some expense in dredging, but this is an argument that all of the wharf-owners in Portland might have made for a change in the harbor lines. He says that the harbor lines of 1892 ran through shallow water. This is true as to a low stage of water, but there is a considerable portion of the year when it is not true. But harbor lines are not established for a year or five years; they are intended to be permanent. They look to the future as well as the present.

Commercial men who do business in Portland know that its harbor is now too narrow for the convenience of shipping; and at no distant day all available space in the river must be utilized to meet the necessities of the situation. Portland is the great commercial emporium of the northwest, and when the resources of this region are more largely developed and the trade with European and
108 Asiatic countries is immensely increased, as it will be, the harbor of our city, with all that can be done to increase its size, will be insufficient to accommodate that commerce. One object of organizing the Port of Portland was to dredge out and widen that harbor. But if one man can extend his wharf into the river to suit his interests, so can another; and thus the commercial welfare of the State will be sacrificed to the greed of individuals.

We submit that upon the law and facts of this case, the decree of the court below ought to be reversed.

WILLIAMS, WOOD & LINTHICUM AND
J. M. LONG, *Attorneys for Appellants.*

109 In the Supreme Court of the State of Oregon, October Term, 1898.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
vs.
JAMES B. MONTGOMERY, Defendant and Respondent.

Brief of Respondent.

Appeal from the decree of the circuit court for Multnomah county—Hon. John B. Cleland, judge.

Stott, Boise & Stout and Mitchell & Tanner, attorneys for respondent.

Filed April 13, 1899.

J. J. MURPHY, *Clerk,*
By W. P. WILLIAMS,
Deputy Clerk.

110 In the Supreme Court of the State of Oregon, October Term, 1898.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
vs.
JAMES B. MONTGOMERY, Defendant and Respondent.

Appeal from the decree of the circuit court for Multnomah county—Hon. John B. Cleland, judge.

The Pleadings.

The facts stated in the bill of complaint are insufficient to constitute a cause of suit.

I.

The bill of complaint does not state facts sufficient to constitute a cause of suit in this, that there is no proper averment, either that the wharf being constructed by the respondent, Montgomery,
111 is or ever will be any obstruction whatever to the navigation or other use of the harbor, or that such wharf is or ever will be a public nuisance, or that its construction as proposed will in any manner, or to any extent, interfere with the work of the Port of Portland in improving such harbor.

Bill of complaint, Appellant's Abstract of Record, 1–9.

The objection that the complaint does not state facts sufficient to constitute a cause of suit is not waived by failure to demur, and this objection may be taken advantage of in the appellate court.

Hill's Annotated Laws of Oregon, vol. 1, sec. 71, p. 210.
Brown *vs.* Emerson, 3 Oregon, 452.
Evarts *vs.* Steger, 5 Oregon, 147.
Mack *vs.* Salem, 6 Oregon, 275.
Olds *vs.* Carey, 13 Oregon, 362.
Caldwell *vs.* Ruddy, 1 Idaho, N. S., 760.
Willits *vs.* Walter, 32 Oregon, 411.

II.

The court below had no jurisdiction of this cause, for the reason that the bill of complaint does not state facts sufficient to con-
112 fer jurisdiction upon a court of equity. The court below, therefore, did not err in dismissing appellant's bill, and this objection is not waived by failure to demur.

Hill's Annotated Laws, vol. 1, sec. 71, p. 210, and authorities *supra*.

III.

The defendant, respondent here, was entitled to judgment on the pleadings, dismissing the plaintiffs' bill of complaint for the reason no replication whatever was filed by the plaintiffs to the further and separate answer of the defendant setting up new matter.

Appellant's Abstract of Record 17–26.

Therefore all the material averments in such separate answer must be taken as admitted by the plaintiffs to be true, and these admissions entitle the defendant to a decree dismissing the plaintiffs' bill.

Points and Authorities on Merits.

I.

By article 1, section 8, clause 3, of the Constitution of the United States, a grant of power is given to the Congress "to regulate
113 commerce with foreign nations, and among the several States, and with the Indian tribes."

This clause of the Constitution, which confers upon Congress the power to regulate commerce among the several States, leaves to the States, IN THE ABSENCE OF CONGRESSIONAL LEGISLATION, the power to regulate matters of *local* interest, which affect INTERNATIONAL AND INTERSTATE commerce only INCIDENTALLY; but the power of Congress over COMMERCE WITH FOREIGN NATIONS and interstate commerce is EXCLUSIVE whenever the matter is NATIONAL IN CHARACTER, and admits of a uniform system or plan of regulation.

In other words, as to those subjects of commerce which are *local* or *limited* in their nature or sphere of operation, such as the erection of bridges, the establishment of harbor lines in harbors, etc., the city may prescribe regulations, *until Congress assumes control of them*, but as to such as are *national in their character*, and *require uniformity of regulation*, the power of Congress is exclusive, and until Congress acts such commerce is entitled to be free from State regulation, exactions and burdens.

Gibbons *vs.* Ogden, 9 Wheat., 1.
Brown *vs.* State of Maryland, 12 Wheat., 419.
Wheeling Bridge Case, 13 How., 421.
Gillman *vs.* Philadelphia, 3 Wall., 713.
Cannon *vs.* New Orleans, 20 Wall., 577.
114 Wisconsin *vs.* Duluth, 96 U. S., 388.
Turner *vs.* Maryland, 107 U. S., 38.
South Carolina *vs.* Georgia, 93 U. S., 4.
Transportation Co. *vs.* Parkersburg, 107 U. S., 691.
Gloucester Ferry Co., *vs.* Pennsylvania, 114 U. S., 196.
Brown *vs.* Houston, 114 U. S., 624.
Morgan Steamship Co. *vs.* Louisiana, 118 U. S., 455.
U. S. *vs.* Duluth, 25 Fed. Cases, 925.
Ouchita Packing Co. *vs.* Aiken, 121 U. S., 444.
Gould on Waters, sec. 138, page 254.
Lawton *vs.* Steele, 152 U. S., 137.
Covington & Cincinnati Bridge Co. *vs.* Kentucky, 154 U. S., 204.

II.

The establishment of harbor lines in the navigable waters of the United States by Congress is an exercise of the constitutional grant of power to regulate commerce with foreign nations and among the several States, and although the State, or a municipality acting

under authority from the State, may, *in the absence of any action by Congress*, establish such harbor lines, such action relating to
115 a subject of local interest, and which affects international and interstate commerce only *incidentally*, yet, whenever Congress acts, then the power of the State is at an end, and if any conflicts exist between the lines established by the national and State governments respectively, those of the State must give way to those established by the General Government.

Same authorities as above also.

III.

Congress has jurisdiction, in the exercise of its power to regulate commerce, over the navigable waters of a river lying wholly within the limits of a single State.

Gibbons *vs.* Ogden, 9 Wheaton, 1.
Veasie *vs.* Moor, 14 How., 568.
Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 251.
Sillman *vs.* Hudson River Bridge Co., 2 Wall., 403.
Gillman *vs.* Philadelphia, 3 Wall., 713.
The Pas-aic Bridges, 3 Wall., 782.
Pound *vs.* Turke, 95 U. S., 459.
Brown *vs.* Houston, 114 U. S., 622.
Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.
And authorities *supra*.

116 IV

The action of Congress in enacting sections 7 and 12 of the river and harbor act of September 19, 1890, (26 Statutes at Large, pages 454–455) conferring certain powers on the Secretary of War, is not a delegation of legislative powers, and said sections are constitutional.

Wayman *vs.* Southard, 10 Wheaton, 1–43.
Cooley's Constitutional Limitations, 137.
Sutherland on Statutory Construction, sec. 68.
U. S. *vs.* Eliason, 16 Peters, 291.
The Gratiot *vs.* U. S., 4 How., 80.
Smith *vs.* Whitney, 116 U. S., 167.
Tilley *vs.* R. R. Co., 5 Fed. Rep., 641.
R. R. Co. *vs.* Dey, 35 Fed. Rep., 866.
In re Griner, 16 Wis., 447.
U. S. *vs.* Ormsbee, district court, southern district of Wisconsin, May 9, 1896, 74 Fed. Rep., 209.
Field *vs.* Clarke, 143 U. S., 649–693.
Locke's Appeal, 72 Penn. St., 491.
South Carolina *vs.* Georgia, 93 U. S., 13.
Miller *vs.* Mayor of New York, 109 U. S., 385.
U. S. *vs.* City of Moline, U. S. district court, northern district of Illinois, 82 Fed. Rep., 596.
117 U. S. *vs.* North Bloomfield Gravel Mining Co., U. S. circuit court, northern district of California, 81 Fed. Rep., 253.

State *vs.* Railroad Co., 37 N. W. Rep., 782.
State *vs.* Railroad Co., 35 N. W. Rep., 118.
Stone *vs.* Trust Co., 116 U. S., 307.
United States *vs.* Romard *et al.*, 89 Fed. Rep., 157.
Fallbrook Irg. Dist. *vs.* Bradley, 164 U. S.
State *vs.* Gerhardt, 145 Ind., 439.
Sec. 12, deficiency act, March 9th, 1891, 26 U. S. Stat., pages 800–868.
Sec. 4, river and harbor act, Aug. 17th, 1894, Supp. Rev. Stat. U. S., vol. 2, page 250.

V.

The power conferred on the Secretary of War by sections 7 and 12 of the river and harbor act of September 19, 1890, *supra*, is *plenary*, and the enactment of those sections by Congress was a full exercise of all the constitutional power possessed by Congress in reference to the establishment of harbor lines, while the other portions of the act, relating to bridges, was only a *partial* exercise of the power exercised by Congress; therefore the two pieces of legislation, relating to the two different subjects, although all in
118 the same act, are radically different in both purpose and scope, and the correct interpretation and application of the one; that is that portion of the act relating to *bridges*, as considered and interpreted in the case of the Lake Shore and Michigan Railway Company *vs.* The State of Ohio, 165 U. S., 365, can have no legitimate bearing in the interpretation and application of sections 7 and 12 relating *solely* to the establishment of *harbor* lines. Sections 4 and 5 and a part of section 7 of the river and harbor act of September 19, 1890, relate to *bridges* (26 Statutes at Large, page 426–453); while section 12 and a part of section 7, same act, relate *solely* to the establishment of *harbor lines*.

26 Statutes at Large, 426–453.
Act Sept. 19, 1890, 26 U. S. Stat., 453–455.
Lake Shore & Michigan Railway Co. *vs.* State of Ohio, 165 U. S., 365.

VI.

The act of G. D. Meiklejohn, acting Secretary of War, is the act of the Secretary of War.

U. S. Rev. Stat., sec. 177, page 28.
Sup. U. S. Stat., vol. 1, 2d ed., page 707.

VII.

The power given to the Secretary of War by section 12 of
119 the act of September 19, 1890, *supra*, to establish harbor lines, implies necessarily the power to modify, change or create anew.

United States *vs.* The Eliason, 16 Peters, 291.
United States *vs.* Romard, 89 Fed. Rep., 157

VIII.

The facts, as presented by the pleadings and evidence, conferred jurisdiction on the Secretary of War to relocate and re-establish the harbor line in the manner the same was relocated and re-established by him September 23, 1898.

Numbers sixth, seventh and eighth of the findings of fact. (Abstract of Record, 35–43.)

IX.

The harbor lines caused to be established by the Secretary of War in front of the property of the respondent, Montgomery, August 9, 1892, was on proper application changed and re-established by the Secretary of War, September 23, 1898.

Numbers sixth, seventh and eighth findings of fact. (Abstract of Record, 35–43.)

Sec. 12 act Sept. 19, 1890; 26 Stat., 455.

120 X.

Although it should be conceded that the Secretary of War is without power to change or re-establish a harbor line previously established by him, as contended for by counsel for appellants, it is clear beyond question he had by virtue of sections 7 and 12 of the river and harbor act of September 19, 1890, *supra*, power to grant a permission to the respondent, Montgomery, to extend his wharf outside the harbor line established August 9, 1892, and having on proper application done so, neither the State of Oregon, City of Portland, nor the Port of Portland, has any right or power to prevent it.

Sections 7 and 12, river and harbor act September 19, 1890. (26 Statutes at Large, 426–453.)

Numbers sixth, seventh and eighth findings of fact. (Abstract of Record, 35–43.)

XI.

The wharf being constructed by respondent is located on lands bordering on the navigable waters of the Willamette river in Portland harbor within the limits of the city of Portland, the fee of which is in the respondent, James B. Montgomery.

Paragraph VII, bill of complaint, Abstract of Record, 5 and 6.

121 Answer, paragraph VI, Abstract of Record, 14.

Also separate answer, paragraph I, Abstract of Record, 24.

Also fifth finding of fact, Abstract of Record, 35.

XII.

The riparian owner in Oregon, in the absence of restrictive legislation, has the right by the *common law* to connect his shore line by means of wharves, piers or docks constructed over the shoal or

shallow waters immediately bordering upon his land with the waters *which are navigable in fact.*

This he has the right to do not only in his own interest as a riparian proprietor, but as well also in the interest of the public, and of national and interstate commerce.

Railway Company *vs.* Schurmeier, 7 Wall., 272.
Yates *vs.* Milwaukee, 10 Wall., 297.
Weaver *vs.* Harbor Commissioners, 18 Wall., 57.
Dutton *vs.* Strong, I Black, 23.

XIII.

But in the State of Oregon there is added to this common-
122 law right of the riparian owner, *supra*, an *express grant from the State.* Section 4227, act of 1862, Hill's Code, which authorizes the owner of any land in Oregon lying upon any navigable stream, within the corporate limits of any incorporated town, to construct a wharf or wharves upon the same, and to extend such wharf or wharves into such stream beyond the low-water mark "*so far as may be necessary and convenient for the use and accommodation of ships*, or other boats or vessels that may or can navigate such stream."

Act of 1862, Hill's Code, sec. 4227.

XIV.

The question as to what constitutes a public nuisance must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a State can declare any particular business or structure a nuisance in a summary mode and enforce its decree at its own pleasure. Whether a bridge or a pier is a public nuisance or not, whether the same is an obstruction to navigation and commerce or not, is a *question of fact*, and no simple declaration of a municipality can determine the question.

Dutton *vs.* Strong, 1 Black, 32.
Yates *vs.* Milwaukee, 10 Wall., 504.
Angell on Tide Waters, 196.
West Hartford *vs.* Hartford Water Co., 68 Conn., 323, 36 Atlanta Rep., 786.
123 Milne *vs.* Davidson, 16 Am. Dec., 195.
Cooley on Court Limitations, 6th ed., 741, note.
Everett *vs.* Council Bluffs, 46 Iowa, 67.
Railroad Co. *vs.* Joliet, 79 Ill., 44.
Butchers' Union *vs.* Crescent City, 111 U. S., 746.
Smith *vs.* Minto, 30 Oregon, 353.
2 Dillon on Mun. Corp., 4th ed., sec. 800.
Grossman *vs.* City of Oakland, 30 Oregon, 478.

XV.

The provision of the city charter conferring power on the City of Portland, "to regulate the building of wharves and the driving of

piles in the Willamette river within the limits of the city, and to establish a line beyond which wharves shall not be built nor piles be driven" (bill of complaint, Abstract of Record, 2) does not authorize it to declare by a special ordinance that a private wharf is an obstruction to navigation and a public nuisance, *if in point of fact* it is not such obstruction or a public nuisance.

Yates *vs.* Milwaukee, 10 Wall., 498.
Smith *vs.* Minto, 30 Oregon, 353.
Grossman *vs.* City of Oakland, 30 Oregon, 478.
And authorities *supra.*

124 XVI.

Conceding the right of both the City of Portland and the Port of Portland, as claimed by appellants, to establish *wharf lines* in the harbor of the city of Portland, it is respectfully submitted that any action taken by the appellants in that regard in order to have any binding effect whatever, must be *reasonable* and we submit that the location of the line by the City of Portland, and by the Port of Portland, as fixed by the former, December 12, 1892 (Abstract, 2) and by the latter November 23, 1898 (Abstract, 6), in front of respondent's property, in water averaging less than one foot in depth, and from bare ground at low water to not exceeding two feet in depth at any point, (Abstract, 35 and map Exhibit "A" part of answer) was an *unreasonable exercise of municipal power* upon the part of appellants and binds nobody.

Authorities, *supra.*

XVII.

Conceding for the argument, that the City of Portland had the power to establish a wharf line, and to declare that wharves should not be extended outside of such line, even then the simple declaration of the municipality that the wharf was being constructed outside of such lines, and that the construction of the same was an obstruction to navigation and therefore a public nuisance, will
125 not determine the question; and on such a declaration alone in the complaint, especially if the answer denies that the construction of the wharf does in any manner interfere with navigation or commerce, or the improvement of the river, and that it is not a nuisance, either public or private, the plaintiff, the municipality, must prove by evidence *other than the mere declaration of the city itself*, that the structure does interfere with navigation, or the improvement of the river or commerce, and that it is a public nuisance.

Yates *vs.* Milwaukee, 10 Wall., 498.
Angell on Tide Waters, 196.
And authorities, *supra.*

XVIII.

In the incorporation act of the Port of Portland (bill of complaint, Abstract of Record, 3–4,) there is no authority whatever conferred

upon the Port of Portland to establish *harbor* lines or *wharf* lines. The act, therefore, upon the part of the commissioners of the port of Portland, immediately preceding the commencement of this suit, November 2, 1898, in establishing by resolution (bill of complaint, Abstract of Record, 5–6) wharf lines on both sides of the Willamette river, was *ultra vires* and amounts to nothing; nor has The Port of Portland, appellant, any authority or jurisdiction whatever to declare what shall or shall not be the harbor or wharf line in
126 the harbor of the city of Portland, or to declare what shall or shall not constitute a public nuisance in the Willamette river.

Sections 6, 7 and 12, river and harbor act, September 19, 1890, 26 Stat., 453-456.

Sec. 7, act 1890, as amended July 13, 1892, Supp'l Rev. Stat. U. S., vol. 2, page 30.

XIX.

The harbor lines having been established in the Portland harbor by the Secretary of War, August 9, 1892, in pursuance of the power conferred on him by the twelfth section of the river and harbor act of September 19, 1890 (26 Statutes at Large, 46), therefore, the ordinance of the common council of the city of Portland, approved December 12, 1892, establishing harbor or wharf lines (Abstract of Record, 2) was unconstitutional and wholly inoperative, except in so far as the harbor or wharf line established by such ordinance did not conflict with the line established by the Secretary of War; and wholly unconstitutional and inoperative as placing any restraint whatever on the Secretary of War to grant permission for the extension of a wharf or pier outside of the line established by him, August 9, 1892, as authorized by the seventh and twelfth sections of the act, *supra;* and by the re-establishment by the Secretary of War of the harbor line in front of the respondent's property, September 23, 1898, and by the permit of the Secretary author-
127 izing Montgomery to extend his wharf outside the harbor line established August 9, 1892, the harbor or wharf line established by said city ordinance, in so far as it conflicts with the line as thus re-established by the Secretary of War, and with the permit of the Secretary of War, became a dead letter and wholly fruitless of any right whatever.

Authorities, *supra.*

XX.

From the pleadings in this case (bill of complaint, Abstract of Record, 1–9), it is shown, and conceded by complainants, that no action whatever had been taken either by the City of Portland or the Port of Portland, establishing either harbor or wharf lines in the harbor of Portland prior to August 9, 1892, when the harbor lines in said harbor were caused to be established by the Secretary of War. And it is further shown and conceded by said bill of complaint, that the State of Oregon had not, prior to September 19, 1890, the date of the passage of the river and harbor act, *supra*

conferring power on the Secretary of War to cause harbor lines to be established in the navigable harbors of the United States, passed any act conferring upon the City of Portland power to establish harbor or wharf lines. This power on the part of the city only dates from February 19, 1891 (bill of complaint, Abstract of Record, 2). When, therefore, the General Government, in the interest of international and interstate commerce, assumed jurisdiction of the
128 waters of the Portland harbor by establishing harbor lines therein, neither the State of Oregon, nor the City of Portland, nor the Port of Portland, had established or attempted to establish any such harbor lines.

Bill of complaint, Abstract 1–9.

XXI.

"The authorities of a town will not be permitted to locate an imaginary deep-water line away from the navigable part of a river or bay and without making the water navigable up to that line, so as to deprive the riparian owners of the advantages of wharves, under a provision of law conferring upon such town the right to regulate the line of deep water to which wharves may be built."

Wool *vs.* Edenton, 117 S. C., 1, 23 S. E. Rep., 40.

And authorities *supra*.

XXII.

Whenever a police power is so exercised by a State as to come within the domain of Federal authority, as defined by the Constitution, the latter must prevail.

Gibbons *vs.* Ogden, 9 Wheat., 1–210.

Henderson *vs.* The Mayor, 92 U. S., 259–272.

129 New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650–661.

Morgan *vs.* Louisiana, 118 U. S., 464.

XXIII.

The police power does not extend to depriving any person of the lawful use of property without due process of law, and without just compensation.

Matter of Jacobs, 98 N. Y., 110; 50 Am. Rep., 636.

Matter of Cheesbrough, 78 N. Y., 232.

Rockwell *vs.* Nearung, 35 N. Y., 302.

14 amendment Const. U. S.

XXIV.

"Wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river." (Transportation Co. *vs.* Parkersburg, 107 U. S., 707.) No foreign or interstate commerce can be carried on with the citizens of a State without the use of a wharf.

Mr. Justice Field in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 205.

130 *Argument as to Insufficiency of the Bill of Complaint to Constitute a Cause of Suit.*

It is submitted the bill of complaint in this case does not state facts sufficient to constitute a cause of suit, or to confer jurisdiction on a court of equity as to subject-matter.

A careful examination of the complaint will disclose the fact that there is no averment in it from beginning to end, to the effect that the driving of piles and the construction of the wharf by the defendant, Montgomery, in any manner injures the harbor of Portland, obstructs its navigation, or in any manner prevents either the City of Portland, or the Port of Portland, from deepening or widening the channel of the Willamette river in said city.

There is no averment that the work being constructed by the defendant, Montgomery, either constituted a nuisance, public or private, at the commencement of this suit, or that the same will, if completed, constitute any such nuisance.

It is true the bill of complaint avers that on a certain date the board of commissioners of the port of Portland, at a meeting duly called and held, adopted certain resolutions upon that subject, and that on a certain other date, November 23, 1898, at another
131 meeting of the board of commissioners of the Port of Portland, duly called and held, said commissioners adopted a certain wharf line, and did further resolve that the observance of such wharf line in the construction of wharves is necessary for a good and sufficient width of channel in said river, etc. But it is respectfully submitted, that the averment in the bill of complaint that said resolutions were adopted some time previously by the board of commissioners of the port of Portland, even conceding any power in said board to pass such resolutions, which we deny, is very far from being equivalent to an averment in the bill of complaint itself of the *existence of the facts stated in the resolutions*, and, further, that said board of commissioners had no jurisdiction or power to adopt such resolutions, or establish wharf lines; therefore, unless after eliminating these two sets of resolutions from the bill of complaint, there is sufficient left in the bill to constitute a cause of suit, then the judgment of the court below should be affirmed, if for no other reason, because of the failure of the bill of complaint to state facts sufficient to constitute a cause of suit.

A critical examination of the bill of complaint will show that, briefly stated, the following are the *sole* material averments it contains:

1. The appellant, The City of Portland, is a municipal corporation in the State of Oregon, existing by and under the laws of said State.

2. That the charter of said city provides that its common
132 council "shall have power to regulate the building of wharves and driving of piles in the Willamette and Columbia rivers within the city of Portland, and to establish a line beyond which wharves shall not be built or piles driven," and that such provision

has been since February 19, 1891, and is now, in full force and effect.

3. That on the ninth day of August, 1892, the United States engineers established a wharf line in the Willamette river within said city of Portland.

4. That by section 1 of an ordinance of the common council of said city, approved December 12, 1892, the wharf lines of the Willamette river were established in conformity to and coincident with the wharf lines established by the U. S. engineers.

5. That section 3 of said ordinance provides as follows: "All wharves or other structures hereafter built or erected on the river front of the city on the east side of the Willamette river shall not extend westerly beyond the line as laid down in section 1 of this ordinance, and all permits hereafter granted by the common council for the driving of piles, or the erection of structures, shall conform to said line."

6. That on the eighteenth day of February, 1891, the Legislative Assembly of the State of Oregon passed an act incorporating the Port of Portland, sections 1, 2, 3, and 9 of which are set out in the bill of complaint.

7. That the defendant, James B. Montgomery, is now and
133 for some time has been engaged in the construction of a wharf on the east side of the Willamette river, within the the city of Portland, and is driving piles and otherwise proceeding with the construction of said wharf in said river outside of the wharf line established as aforesaid, and proposes and declares his purpose to be to construct and complete said wharf between the center line of Essex street projected, to the river on the north, and the center line of Randolph street projected, to the river on the south, and extending into the river eighty-five feet beyond the said wharf line, and occupying more than 30,000,000 square feet of the bed of said river.

8. That on the twenty-first day of November, 1898, the board of commissioners of the port of Portland at a meeting duly called and held adopted certain resolutions which are set out in the record.

9. And on the twenty-third day of November, 1898, at a meeting of the board of commissioners of the port of Portland, duly called and held, another resolution, which is set out in the record, was passed.

10. That the Willamette river is a river wholly within the State of Oregon.

11. That the defendant, Montgomery, notwithstanding said ordinance of the city and the proceedings of said Port of Portland, persists in the construction of said wharf as aforesaid, and will, unless restrained by an order of the court, complete said wharf in the manner and to the extent indicated.

134 12. That the appellants have no plain, speedy or adequate remedy at law.

Abstract of Record, 1–9.

Conceding, therefore, for the present the right of the appellants to sue, and also their right to establish wharf lines and regulate their construction and use; on these several averments, which, when boiled down, mean simply this; that the appellants established wharf lines; that in an ordinance of the city and in the resolutions of the board of commissioners of the port of Portland establishing said lines, it was declared wharves should not be constructed beyond them, and that the respondent, Montgomery, is about to extend his wharf beyond said line, and without any averment in the complaint that the action of Montgomery in so extending his wharf in any manner, or to any extent, obstructs the navigation or commerce of the harbor, or in any manner interferes with the work of the Port of Portland in improving such harbor, or that his action if permitted to go on will create a nuisance either public or private, or that such wharf is being constructed any further beyond the line of low-water mark than is necessary and convenient for the use and accommodation of ships entering said harbor, a court of equity is asked to enjoin respondent from proceeding with the construction of his wharf.

We respectfully submit the bill of complaint, taken as a
135 whole, and however construed, fails to state facts sufficient to constitute a cause of suit, and also fails to state facts sufficient to confer jurisdiction on a court of equity.

The objections that the complaint does not state facts sufficient to constitute a cause of suit, and that the court has not jurisdiction are not waived by failure to demur, and these objections may be urged in the appellate court.

Hill's Annotated Laws of Oregon, vol. 1, sec. 71, p. 210.
Brown *vs.* Emmerson, 3 Oregon, 452.
Evarts *vs.* Steger, 5 Oregon, 147.
Mack *vs.* Salem, 6 Oregon, 275.
Olds *vs.* Carey, 13 Oregon, 362.
Kaldwell *vs.* Ruddy, 1 Idaho, N. S., 760.

Upon filing separate answer by respondent, (Abstract of Record 17–26) and failure of appellants to file any reply, respondent was entitled to judgment on the pleadings dismissing bill of complaint.

The court will observe, by reference to the appellant's abstract of record, that the defendant in his answer after making certain admissions and denials of the averments of the complaint (Ab-
136 stract, p. 10–17) makes a further and separate answer to the bill of complaint setting up new matter in defense. (Abstract, 17–26.) To this answer no replication has been filed, either to the whole or any part of it. Therefore, all material averments in the same must be taken as true.

Counsel for appellants filed a demurrer to certain portions of said separate answer, and a motion to strike out certain other portions, both of which were overruled by the court and no further pleading was filed.

No question is made in appellant's brief as to the correctness of

the decision of the court below in overruling said demurrer and motion to strike out.

The court will bear in mind there is no averment in the bill of complaint, aside from the recital of the resolutions of the board of commissioners of the port of Portland, to the effect that the construction of the respondent's wharf will in any manner interfere with the commerce or navigation of the harbor, or that the same will in any manner interfere with the work of the Port of Portland in widening and deepening a channel, or that the same will be a nuisance, either public or private, nor that the said wharf is being constructed further beyond the line of low-water mark than is *necessary or convenient for the use and accommodation of vessels.* (Hill's Code, sec. 4227.)

While the respondent in his separate answer makes the following affirmative averments, the same not being a denial of any
137 averments in bill of complaint, none of which are denied by any reply, and therefore must be taken as true:

"The defendant further avers that the construction of his said wharf at the place and in the manner he is constructing and intends to complete the same, does not in any respect curtail the navigable waters of the Willamette river at the city of Portland, nor is the same, nor will it be any obstruction to navigation or to the work of the Port of Portland in making and maintaining a proper depth of water, in so far as the Port of Portland may have any rights in the premises. Defendant avers that the construction of said wharf as planned and being constructed by him, instead of being any injury to the commerce and navigation of the Willamette river at the port of Portland, will be a benefit to the same, and a valuable aid in the carrying on of foreign and interstate commerce at said port of Portland." (Abstract of Record, 24, 25.)

We submit, therefore, in any view of the matter, respondent is entitled to judgment and decree on the pleadings dismissing bill of complaint.

138 *Argument on Merits.*

I.

The assignment of errors, No. 6, 7, 9, 10 and 11, (Abstract of Record, 50–51) may be considered as one as there is really but one question involved in these assignments, and the *query* they suggest is simply this:

Assuming that the Secretary of War has the constitutional and statutory power to establish harbor lines in the harbor at the city of Portland, and assuming furthermore that he has in pursuance of such power established such harbor lines, then must any harbor or wharf lines established by the State, or by the city or port of Portland, under authority from the State, give way to the latter, in so far as they conflict with the lines established by the Secretary of War?

In other words, must the national authority or the State authority be paramount?

Leaving, therefore, the question as to the constitutionality of section 12, of the river and harbor act of Congress, of September 19, 1890, (26 Statutes, 455) which is the question suggested by the *third* assignment of error, and also the question as to the right of the Secretary of War to change in September, 1898, the harbor lines established by him in August, 1892, as questioned by the *fourth* assignment, and also the question as to whether from the facts
139 stated in the pleadings and evidence, the acting Secretary of War, G. D. Meiklejohn, had any jurisdiction to fix or interfere with the harbor lines in the city of Portland, as suggested by the *fifth* assignment, all to be discussed and considered later in this brief, and assuming for the present that none of these assignments are well taken, we will endeavor to establish the proposition that the harbor lines as established by the Secretary of War, September 23, 1898, must control, and any *harbor* or *wharf* lines established by the city, or port of Portland, in so far as they conflict with the lines thus established in virtue of the national authority in September, 1898, must be regarded as abrogated, inoperative and void.

The solution of these questions involves a careful consideration and determination of the powers respectively of the national and State governments, in respect to the establishment of harbor lines in the navigable waters of the United States.

The inquiry arises, therefore:

First. What are the character and extent of the power conferred on Congress by what is known as the commercial clause of the Constitution of the United States?

Second. How far and to what extent has such power been exercised by Congress?

In many instances Congress has never yet exercised to its full limit *all* the power conferred by certain grants in the Constitution, while in others the full power granted has been exercised.
140 For instance, there are many subjects of legislation, doubtless, in reference to which Congress might constitutionally legislate in virtue of the power conferred by the commercial clause, but in reference to which in some instances no action whatever has been taken by Congress, while in respect to others there has been only a *partial* exercise of the power granted.

As will be seen as we progress with this argument, there has been only a *partial* exercise of the power upon the part of Congress in reference to the *construction of bridges* over navigable waters of the United States, still leaving a modicum of power to the States repectively; while the power to establish *harbor lines* has been exercised by Congress to its *fullest extent*, leaving nothing whatever to the States, after Congress has acted.

We will concede in the outset that until the National Government acts, and establishes harbor lines in any navigable harbor of the United States lying wholly within the limits of a State, the power to establish harbor lines in such harbor is vested in the State within which such harbor lies, and the State in that case may either directly, or through a municipality, rightfully exercise such power and establish such harbor lines.

But, we submit as an incontrovertable proposition, that whenever Congress acts, either directly or through a proper instrumentality, such as the Secretary of War, and establishes harbor lines in any navigable harbor of the United States, although the same
141 may be located wholly within the limits of a State, that then any harbor lines or line established in such harbor, either before or afterwards, by the State, or by any municipality operating in pursuance of authority conferred by the State, which in any manner conflict with the lines thus established by the General Government, must give way to the lines so established by the paramount authority.

The Principle Involved.

The principle involved in this controversy is one which more than any other has in the past history of this country commanded the best thought of both jurists and statesmen. The question as to the precise line which separates from each other the respective powers of the National and State governments, has, for more than three-quarters of a century presented a controversy in Congress and legislatures, and judicial courts as well, wherein the best minds of the country were called into action, and which finally culminated in civil war; and yet, in the gradual development of the nation there must, in the very nature of things, arise from time to time disputes and conflicts of jurisdiction to be settled by the courts as to the proper location of this line of separation. The courts, both Federal and State, always careful that every right which properly attaches to a State should be preserved, have ever proceeded on the theory that it is infinitely better that the States respectively should be deprived of a *doubtful* power,
142 rather than that the National Government should be deprived of a *doubtful* prerogative, and which might, therefore, tend to weaken its paramount authority and sovereign capacity as a national government; and hence it is, if the question at issue bearing upon this subject is at any time in any controversy one of doubt, that doubt should always, in defining and distributing the powers of the Federal and State governments, be resolved in favor of the former. It is believed, however, the questions involved in the case at bar, have not been left in any doubt by the decisions of our highest judicial tribunal, and that they will, therefore, be found of easy solution by this honorable court.

At the risk of extending this argument to an unusual length we, for the convenience of the court, quote freely from authorities cited in support of our several propositions.

Authorities in Point.

II.

Mr. Justice Field, in Gloucester Ferry Company *vs.* Pennsylvania, 114 U. S., page 203, says:

"The power to regulate commerce between the States, as well as with foreign nations, vested in Congress, is the power to prescribe

the rule by which it shall be governed; that is, the conditions upon which it shall be conducted; to determine when it shall be
143 free and when subject to duties or other exactions. The power also embraces within its control *all the instrumentalities by which the commerce may be carried on and the means by which it may be aided and encouraged.* The subjects, therefore, upon which the power may be exerted are of infinite variety. While, with reference to some of them which are local and limited in their sphere of operation, the States may prescribe regulations *until Congress intervenes and assumes control of them*, yet, when they are *national* in their character, and require uniformity of regulation affecting alike all the States, *the power of Congress is exclusive.*"

County of Mobile *vs.* Kimball, 102 U. S., 697.

Mr. Cooley, in Cooley's "Constitutional Limitations," page 732, says:

"It is not doubted that Congress has the power to act beyond the general regulations of commerce which it is a custom to establish, and to descend to the most *minute directions* if it shall be deemed advisable, and that to *whatever extent* ground shall be covered by those directions, *the exercise of State power is excluded.*"

Cooley's "Constitutional Limitations," 732.

In the case of Wisconsin *vs.* Duluth, 96 U. S., 383, in which the question as to the power of Congress and the rights of the States, respectively, to regulate commerce on the navigable waters
144 and rivers of the country was considered, the Supreme Court of the United States, speaking by Mr. Justice Miller, said:

"It is to be observed, as preliminary to an examination of the acts of the General Government in the special matter before us, that the whole system of river, lake and harbor improvements, whether on the seacoast or on the lakes, *or the great navigable rivers of the interior*, has, for years, been mainly under control of that Government, and that *whenever it has taken charge of the matter, its right to the exclusive control has not been denied* * * * nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the Government was organized under the Constitution. The only question ever arising has been how far and under what circumstances the exercise of the power is exclusive of its exercise by States. And while this court has maintained, in many cases, the right of States to authorize structures in and over navigable waters of the States, which may either impede or improve their navigation, *in the absence of any action of the General Government in the same matter*, the doctrine has been laid down with unvarying uniformity, that when Congress has, by any expression of its will, occupied the field, *that action was conclusive of any right to the contrary asserted under State authority.* The adjudged cases in this court on this point are numerous. This subject was recently very fully considered in South Carolina *vs.* Georgia, *et al.*, 93 U. S., 4; and it is affirmed in
145 Pound *vs.* Turcke, 95 U. S., 495. The doctrine was settled, however, long before this. The following cases are fully in

point: Gibbons *vs.* Ogden, 9 Wheat., 1; Wilson *et al. vs.* Blackbird Creek Marsh Company, 2 Peters, 245; Wheeling Bridge case, 18 Howard, 421; Gillman *vs.* Philadelphia, 3 Wall., 713."

In the case of Aldrich *vs.* The W. H. Beeman, *et al.*, United States district court of New Jersey for the district of New Jersey, 45 Federal Reporter, 125, which case grew out of a collision occurring July 28, 1889, in the East river, between a ferry-boat and canal-boat towed by a tug, the State of New York had passed a law, prior to such collision, providing that the East river, between the Battery and Blackwell's island, should be navigated, as nearly as possible, in the middle of the stream. The court held that this act upon the part of the State was valid, but the decision was placed distinctly upon the ground that the State act was not in any respect in conflict with any act of Congress upon the subject regulating commerce with foreign nations. The court said:

"Congress is empowered to regulate both foreign and interstate commerce, and, whenever navigable waters form a highway over which commerce, foreign or interstate, is conducted, they must fall under the legislative control of the Federal Government. The fact that certain waters are navigable and are used for foreign or interstate commerce, does not exclude legislative regulation
146 by a State, if, in fact, *Congress has not legislated in regard to them;* or, if such legislation has been had by Congress, if the legislation of the State *does not come in conflict with the congressional legislation, and is not antagonistic to the rights conferred or granted thereby, its validity is unquestionable.* * * * This statute of New York governing the conduct of vessels, while navigating the East river, *does not*, as far as I am informed, *conflict with or violate any legislation of Congress relating to commerce.*"

See Gould on Waters, sec. 138, page 254.

"It is competent for the State to establish wharf or harbor lines, and to empower commissions to license wharves and piers extending to such lines. Such statutes do not conflict with the commercial power of Congress, *so long as the latter remains unexercised.*"

Savannah *vs.* State, 4 Georgia, 26.

Houck on Rivers, sec. 275, page 177, says:

"In this country, as well as in England, the public ports are considered as the great gates of the Republic, through which all its foreigh intercourse by water is conducted; and, consequently, they can only be established and must, in some respects, be regulated by that department of the Government to which has been delegated the care of foreign commerece."

In the case of South Carolina *vs.* Georgia *et al.*, 93 U. S., page 11, the supreme court, Mr. Justice Strong delivering the opinion, said:

147 "It is not however to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than

the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage, if, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over foreign and interstate commerce is concerned, this is not to be doubted. * * * Upon this subject the case of Pennsylvania *vs.* Wheeling and Belmont Bridge Company, 18 Howard, 421, is instructive. There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and, consequently, the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction to navigation. It was, therefore, decided that the act of Congress declaring a bridge over the Ohio river which, in fact, did impede steamboat navigation, to be a lawful structure, and requiring officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of Congress to regulate commerce.

South Carolina *vs.* Georgia, 93 U. S., 4.

148 In Gibbons *vs.* Ogden, 9 Wheat., 1–34, at page 7, Chief Justice Marshall, in defining the meaning of the term "commerce" in the constitutional provision, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," said:

See also opinion of Justice Johnston, pages 27, 30, 31.

In the case of Herrman *vs.* Beef Slough Manufacturing Company, in the circuit court of the United States for the western district of Wisconsin, the court, (Judgy Bunn) after holding that in that case Congress had never assumed jurisdiction to regulate commerce on the Chippewa river, said:

"But, *until Congress assumes to control the commerce of the river*, I take it to be clear law that, as to those streams that are wholly within the territory of a State, though approachable by other streams from other States, as in this case, from the Mississippi river, that the State within whose boarders such rivers lie may legislate in reference to its commercial use as a public highway."

Herrman *vs.* Beef Slough Manufacturing Co., 1 Fed. Rep., 153.

Mr. Justice Field, in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., page 212, says:

"*The control of the navigable waters of a port and of all public*
149 *waters constituting channels of communication* between the States and foreign countries, is embraced within the commercial power of Congress, and *equally beyond the interference of the States.*"

Steamship Co. *vs.* Port Wardens, 6 Wall., 31.

The word "commerce" used in the commercial clause of the Constitution, comprehends "navigation" within its meaning, and

the power to regulate "*navigation*" is as expressly granted as though that word had been added to the word "commerce."

Gibbons *vs.* Ogden, 9 Wheat., 7–8–9–22–30–31.
Pennsylvania *vs.* Wheeling Bridge Co., 13 How., 518.
South Carolina *vs.* Georgia, 93 U. S., 4.

In the case of the United States *vs.* Bellingham Bay Boom Company, circuit court of appeals for the ninth circuit, decided June 28, 1897, 81 Federal Reporter, 659, that court held that the enactment of section 10 of the river and harbor act of September 19, 1890, was an exercise of the constitutional right of Congress to regulate commerce between the States. The language of the court is this:

"At the time of the passage of the law by the State of Washington, and of the construction of the boom, there was no direct statute of the United States prohibiting the construction or
150 maintenance of such booms in the inland rivers of the State. The adoption of section 10, of the act of Congress, *was an exercise of its constitutional right to regulate commerce between the States.* The object was to take control of the navigable waters of the United States so as to protect the interests of the Government, and prevent obstructions to the free navigation of such waters. It was intended to apply to all cases where the States had failed to pass any law in regard thereto, and to prohibit obstructions not authorized by law. But it was not intended by Congress to be retroactive in its results."

In the case just cited, the boom, which it was sought to remove as an obstruction in the Nooksack river in the State of Washington, had been constructed prior to the passage of the river and harbor act of September 19, 1890, under an act of the legislature of the State of Washington authorizing the same. Therefore, the court held it could not be affected by the congressional act.

It is conceded that *in the absence of legislation by Congress on the subject*, the State may authorize bridges or other works across navigable streams which are wholly within the State, and such legislation is not repugnant to the Constitution of the United States.

Wilson *vs.* Blackbird Creek Marsh Company, 2 Peters, 245.
Gillman *vs.* Philadelphia, 3 Wall., 713.
Pound *vs.* Turcke, 95 U. S., 459.

151 And generally, in respect to commercial matters which are *local* and *limited in their scope*, not requiring national and uniform regulations, the States may regulate them *until Congress intervenes*, but as soon as Congress acts the *State is excluded.*

Gloucester Ferry Company *vs.* Pennsylvania, 114 U. S., 196.
Brown *vs.* Houston, 114 U. S., 622.

Under this grant of power it is unquestionably the right of Congress, if it shall deem proper to exercise it, to *exclusively* regulate and control, with reference to the construction of bridges, the establishment of harbor lines, and the erection of other local structures, in all *navigable waters* of the United States, *whether such waters, either rivers, harbors or bays, lie wholly within a State or otherwise.*

The Wheeling Bridge Case.

In the case of Pennsylvania *vs.* Wheeling Bridge, 13 Howard, 621, it was held that a law of the State of Virginia authorizing the construction of the bridge over the Ohio river at Wheeling was inoperative and void, for this reason, among others: Because it was in conflict with the legislation of Congress, which regulates commerce among the different States and with foreign nations, carried upon that river.

In that case objection was made that there was no act of
152 Congress prohibiting obstructions in the Ohio river. To this objection the court, in its opinion by Mr. Justice McLean, replied as follows:

"It is objected that there is no act of Congress prohibiting obstructions in the Ohio river, and that until there shall be such a regulation, a State in the construction of bridges has the right to exercise its own discretion on the subject. Congress have not declared *in terms* that a State by the construction of bridges or otherwise shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as above remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for the neglect of these duties by which damage to life or property has resulted."

In the case of the State of Pennsylvania *vs.* Wheeling Bridge Co., 13 Howard, 565, *supra*, dissenting opinions were delivered by Chief Justice Taney and Associate Justice Daniels, who, while conceding the power of Congress to regulate commerce upon the Ohio river, dissented for the reason that in their opinion Congress had never exercised the power in such manner as to prevent the State of Virginia from authorizing the construction of the bridge. In other words, these justices, in their dissenting opinions, held more strongly than did the majority of the court in favor of the rights of the States respectively as against those of the General Government.
153 Therefore any statement of law by Mr. Chief Justice Taney as to the extent of the power of Congress in the premises should be taken as correct, at least in so far as it is applicable to the specific powers conceded by him, as he was a strict constructionist.

For the purpose of showing how he regarded the power of Congress under the commercial clause we quote the following from his dissenting opinion (13 Howard, 580):

"The Ohio being a public navigable stream, Congress has undoubtedly the power to regulate commerce upon it. They have the right to prohibit obstructions to its navigation; to declare any such obstruction a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it; and to punish any one who may erect or maintain it; or it may declare what degree or description of obstruction shall be a public nuisance, as, for example, the height of a bridge over the river, or *the distance to which a wharf may be extended into its navigable waters.*"

Mr. Justice Taney, proceeding further, says:

"*But this power has not been exercised. There is no law of the United States declaring an obstruction in the Ohio or any other navigable river, to be a public nuisance*, and directing it to be abated as such. Nor is there any act of Congress regulating the height of bridges over the river. We cannot derive any jurisdiction therefore upon this subject from any law of the United States, and if we
154 exercise it we must derive our authority from other sources."

Here, then, is this great State's right jurist, Chief Justice Taney, asserting that Congress has power under the commercial clause of the Constitution to determine "*the distance to which a wharf may be extended into navigable waters.*"

In the case of The People *ex rel.* Board of State Harbor Commissioners *vs.* Potrero and Bay View Railroad Co., 67 Cal., 166, the supreme court of that State held that while the power of the State with respect to the construction, regulation and control of bridges over navigable streams is subordinate to that of Congress, still *until Congress acts on the subject the power of the State is plenary.*

Cardwell *vs.* American Bridge Co., 113 U. S., 205.

The Cincinnati Bridge Company Case.

The line between the respective powers of the National and State governments as applicable to the case under consideration has nowhere been so clearly defined as by the Supreme Court of the United States, opinion by Mr. Justice Brown, in the case of Covington & Cincinnati Bridge Co. *vs.* Kentucky, 154 U. S., 204. This opinion is so clear and instructive that we must be pardoned for quoting from it at some length. The court, at page 209, says:

"The adjudications of this court, with reference to the
155 power of the States over the general subject of commerce, are divisible into *three* classes:

"*First.* Those in which the power of the *State is exclusive.*

"*Second.* Those in which the States may act *in the absence of legislation by Congress.*

"*Third.* Those in which the *action of Congress is exclusive* and the States cannot interfere at all."

The court proceeding further, says:

"The *first* class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power the State may authorize the construction of highways, turnpikes, railways and canals between points in the same State, and regulate the tolls for the use of the same, (Railroad *vs.* Maryland, 21 Wall., 456) and may authorize the building of bridges over *non*-navigable streams, and otherwise regulate the navigation of the *strictly internal waters of the State, such as do not, by themselves, or by connection with other waters, form a continuous highway over which commerce is, or may be carried on with other States*

or foreign countries. (Veazie *vs.* Moor, 14 How., 568; The Montello, 11 Wall., 411; S. C., 20 Wall., 430.) This is true, notwithstanding the fact that the goods or passengers carried or traveling over such
156 highway between points in the same State may ultimately be destined for other States, and, to a slight extent, the State regulations may be said to interfere with interstate commerce. * * * Congress has no power to interfere with police regulations relating *exclusively to the internal commerce of the States*, (United States *vs.* De Witt, 9 Wall., 41; Patterson *vs.* Kentucky, 97 U. S., 501) nor can it by exacting a tax for carrying on a certain business thereby authorize such business to be carried on within the limits of a State. (License Tax cases, 5 Wall., 462, 470, 471.)"

The court in the case, *supra*, proceeding to define the class of cases that comes under the *second* head *supra*, that is those cases wherein the States may act *in the absence of legislation by Congress*, says:

"Within the *second* class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots: Cooley *vs.* Philadelphia Board of Wardens, 12 How., 299; Steamship Co. *vs.* Joliffe, 2 Wall., 450; *Ex parte* McNeal, 13 Wall., 236; Wilson *vs.* McNamee, 102 U. S., 572. Quarantine and inspection laws *and the policing of harbors:* Gibbons *vs.* Ogden, 9 Wheat., 1–203; City of New York *vs.* Miln, 11 Peters, 102; Turner *vs.* Maryland, 107 U. S., 38; Morgan Steamship Co. *vs.* Louisiana, 118 U. S., 455. The improvement of navigable channels: County of Mobile *vs.* Kimball, 102 U. S., 691; Escanaba Co. *vs.* Chicago, 107 U. S., 678; Huse *vs.* Glover, 119 U. S., 543. *The regulation of*
157 *wharves, piers and docks:* Cannon *vs.* New Orleans, 20 Wall., 577; Packet Co. *vs.* Keokuk, 95 U. S., 80; Packet Co. *vs.* St. Louis, 100 U. S., 423; Packet Co. *vs.* Catlettsburg, 105 U. S., 559; Transportation Co. *vs.* Parkersburg, 107 U. S., 691; Ouchita Packet Co. *vs.* Aiken, 121 U. S., 444. The construction of dams and bridges across the navigable waters of a State: Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 245; Cardwell *vs.* American Bridge Co., 113 U. S., 205; Pound *vs.* Turk, 95 U. S., 459; and the establishment of ferries: Conway *vs.* Taylor's Executors, 1 Black, 603."

The court proceeding further, in the case of the Covington Bridge Company, *supra*, after referring to the fact that it had been held by some in the early history of the Government that the mere *grant* to Congress of power to regulate these matters, was in and of itself a *prohibition on the States* to exercise the same power, and also to the later and well-settled rule that it is not the *grant* of power that deprives the States of power, but the *exercise* of the same upon the part of Congress, and that therefore the States may legislate in the absence of congressional legislation, proceeds to define the kind of cases that come under the *third* class, *supra*, that is, cases wherein the jurisdiction of Congress is *exclusive*, and States have no power at all. On this subject the court says:

"But wherever such laws, instead of being of a local nature,
158 and not affecting the interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammeled and the

case falls within the *third* class of those laws wherein the jurisdiction of Congress is exclusive. Brown *vs.* Houston, 146 U. S., 622; Bowman *vs.* Chicago, etc., R. R. Co., 125 U. S., 465. Subject to the exceptions above specified, as belonging to the *first* and *second* classes, the States have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the States."

The "*regulation of wharves, piers, and docks*" and "*the policing of harbors*" come under the *second* class mentioned by Mr. Justice Brown in the above case.

Notwithstanding all these authorities, wherein the Supreme Court of the United States has declared over and over again that where State legislation regulating the navigable waters of the country comes in conflict with national legislation on that subject, that the national legislation must prevail, counsel for appellants in their brief, page 12, say:

"Now it will be noticed that in these cases the court generally decided in favor of the claims set up under State authority, because there had been no legislation by Congress inconsistent with that authority; and while what was said by the court as to the effect of future legislation by Congress is entitled to respectful con-
159 sideration, it was all outside of the cases before the court and clearly *obiter*."

This statement, we respectfully submit to the court, evinces a great misapprehension, as it seems to us, of the questions before the court and decided by the court in the several cases referred to.

And counsel are clearly at sea, as it seems to us, in the further statement in their brief, immediately following, to this effect:

"Further it will be noticed that the only case decided by the U. S. Supreme Court, since the Wilson case, 2 Peters, *supra*, as to the effect of such legislation after it has been enacted, is the case in 165 U. S."

A reference to the authorities we have cited, *supra*, will show that this statement is also the result of misapprehension.

Counsel for appellants in their brief, 5 and 6, say:

"Now, to fix the harbor lines of the ports of the United States is a regulation of commerce, or it is not. If it is, then the power so to do is exclusively vested in Congress. If it is not, then the City of Portland has an indisputable right to say where the wharf lines in its harbor shall be."

This, we respectfully submit, in view of the overwhelming authorities we have quoted, *supra*, is not a correct statement of
160 the law. The establishment of a harbor line in the waters of a navigable harbor within the limits of a single State may be, and as we confidently assert, is "a regulation of commerce," and yet it does not follow that the power to establish harbor lines in such a harbor is *exclusively vested in Congress*. Upon the contrary, the establishment of harbor lines in such a harbor, being a subject of *local* character, which only affects international and interstate commerce *incidentally*, it follows, in view of the many decisions of the Supreme Court of the United States, with none to the contrary, that

until Congress acts and assumes jurisdiction of the waters of such a harbor, the State, or the city acting under authority from the State, may do so. But, when the National Government acts, then the power of the State to act ceases, and if a conflict between the action of the two jurisdictions arises, that of the State must give way to that of the General Government.

We do not claim by any means, nor is it necessary, at least so far as this case is concerned, that Congress has any power under the commercial clause to authorize the Secretary of War to determine as to size, length, height or character of any wharf or warehouses within the city of Portland, constructed on lands bordering on the Willamette river. Our claim is this: That Congress has the power under the commercial clause to authorize the Secretary of War to establish, locate and fix a certain harbor line, on either side of the harbor at Portland, up to which wharves, piers, warehouses
161 and other commercial aids may be constructed, and beyond which it shall not be lawful, *without the consent of Congress* or *the Secretary of War* representing Congress, upon the part of the State, or any corporation or municipality authorized by the State, or any individual, person, company, association or corporation, to construct or build any wharf, pier or warehouse of any kind whatever. And we claim, furthermore, that this is precisely the power exercised by Congress in the river and harbor act of September 19, 1890.

Congress authorizes the Secretary of War to establish harbor lines.

III.

In accordance with the doctrine recognized by the foregoing authorities, Congress in the river and harbor act of August 11, 1888, as amended in the river and harbor act of September 23, 1890, (26 Statutes, 455) enacted a law the twelfth section of which reads as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, *beyond which no pier, wharves, bulkheads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him;* and any person who shall willfully violate the provisions of this sec-
162 tion, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court for each offense. (Sec. 12, act 1890, 26 Stat., 455.)

This provision will be discussed fully later on in this argument.

Congress has jurisdiction over the navigable waters of a river lying wholly within the limits of a single State.

IV.

Under the commerce clause of the Constitution of the United States, Congress has jurisdiction over a navigable river connecting with the ocean, where the stream is wholly within a single State.

Gibbons *vs.* Ogden, 9 Wheat., 1.
Veazie *vs.* Moor, 14 How., 568.
Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 251.
Sillman *vs.* Hudson River Bridge Co., 2 Wall., 403.
Gilliman *vs.* Philadelphia, 3 Wall., 713.
The Passaic Bridge, 3 Wall., 782.
Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.
Brown *vs.* Houston, 114 U. S., 622.

163 This doctrine was asserted by Chief Justice Marshall, in Gibbons *vs.* Ogden, 9 Wheat., in 1824. The opinion says:

"But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a point within a State, *then the power of Congress may be exercised within a State.*"

What is a navigable water of the United States within the meaning of those terms as used in the legislation of Congress?

V.

What is meant then by "navigable waters of the United States?" They are waters navigable by licensed and enrolled and registered sea-going vessels, engaged in commerce upon the ocean with foreign nations, and with other States, and within the ebb and flow of ocean tides, although this, as to the tides, is not (since the decision of the United States Supreme Court in the case of the Genesee Chief, 12 How., 443) essential, irrespective of the fact that such waters may extend far into the interior of any single State. Nor is it essen-
164 tial in order to bring rivers within this definition, that they should be navigable by sea-going vessels, provided they connect with waters so navigable, and are themselves navigable in fact for steamboats and other craft. That the Willamette river is such a stream cannot be questioned, and although some stress was laid upon this point by counsel in the court below, it seems to be entirely abandoned here as untenable.

It is conceded by us that if this power upon the part of Congress to so control the navigable waters of the United States, in regulating commerce with foreign nations in reference to these *local* matters, is permitted to lie dormant; in other words, if Congress has taken no action in regard to the control generally of these local matters in navigable waters, or of any particular navigable water, that then

the jurisdiction and power to control such waters in these local matters wholly within the limits of the State, rest with the State. The authorities upon this point are uniform and conclusive.

If, however, Congress has asserted the full power referred to in regard to any of the navigable waters of the United States lying wholly within a State, and assumed full jurisdiction over the same, then the State has no power whatever to pass any act looking to the control of such waters which in any manner conflicts with the exerted power of the Federal Government. And any acts pre-
165 viously passed by the State which conflict with the legislation of Congress become immediately obsolete and inoperative.

Congress has taken jurisdiction of and legislated by both special and general acts relative to the waters of the Willamette river.

VI.

What are the facts, then, in reference to the case at bar, and with reference to the navigable waters of the Willamette river running through the city of Portland?

Prior to August 11, 1888, Congress had not asserted any general control over the waters of the Willamette river, except by making appropriations from time to time for the improvement of its navigation. As clearly indicating, however, that Congress regarded these waters as subject to the control of Congress, separate and special acts of Congress were passed in relation to the construction of bridges over the Willamette river; these were passed prior to September 19, 1890.

The first was an act approved February 2, 1870, which gave consent to the city of Portland to erect a bridge from Portland to the east bank of the Willamette river, not obstructing, impairing or injuriously modifying its navigation, and requiring that the city should first submit the plans of such bridge to the Secretary of War for his approval.

166 The second act was passed on the twenty-second day of June, 1874, which authorized the county commissioners of Marion county, or said commissioners jointly with those of Polk county, to build a bridge across the Willamette river at Salem, Or., a distance of fifty miles further into the interior of the State than Portland.

The third act was passed June 23, 1874, which authorized the Oregon & California Railroad Company alone, or jointly with the Oregon Central Railroad Company, to build a railroad bridge across the Willamette river at the city of Portland, with a draw of not less than 100 feet in the clear on each side of the draw-abutment, and so constructed as not to impede the navigation of the river and allow free passage of vessels through the bridge.

These acts, as we have stated, were all of a *special* nature, and did not involve the assumption by Congress of general national police powers over the river.

In the river and harbor act, however, approved September 19,

890, (see Supplement to the Revised Statutes of the United States, olume 1, pages 800–803), Congress enacted a general law, amenda- ory of the act of August 11, 1888, applicable to all the navigable aters of the United States, which, according to the definition here- fore given, included the navigable waters wholly within a State as ell as those not within it.

In this act there were really embodied two separate and dis- 67 tinct acts or provisions—in the different sections, the one hav- ing no relation whatever to the other—the one having *sole* eference to the *construction of bridges*, and *works of like character*, and ne other having *sole* reference to the *establishment by the Secretary of War of the harbor lines* of the various harbors in the United States, nd providing beyond which no wharf, pier, bulkhead or other ob- ruction should be erected, *without permission from the Secretary of War*. Sections 4, 5 and 6, and a part of section 7 of this act relate ainly to the construction of bridges, while a portion of section 7 nd section 12 relate exclusively to the establishment of harbor nes. (26 Stat. U. S., pages 453–455.)

It has been held by the Supreme Court of the United States in the se of The Lake Shore and Michigan Railway *vs.* The State of Ohio, 65 U. S., 365, that the provisions in section 4, 5 and 7 of the act of eptember 19, 1890, above referred to, conferring upon the Secretary f War authority concerning *bridges over navigable waters*, did not eprive the States of authority to bridge such streams; that is, of uthority to both *authorize* their construction, and under certain con- itions, that is, after the plans for the same have been submitted to ne Secretary of War, and approved by him, to *construct* the same, ut simply created an additional cumulative remedy to prevent uch structures, although lawfully authorized, from interfering with ommerce. This authority is quoted by the counsel for appellants in support of their contention in the case at bar.

68 We have no controversy with counsel in regard to the meaning of this decision of the Supreme Court of the United tates in its application to the construction of bridges across navi- able waters wholly within a State. A careful examination, how- ver, of the act of 1890, and a comparison of sections 4, 5, 6 and a art of 7 of that act relating to bridges (and which sections *only* were onstrued by the Supreme Court of the United States in 165 U. S., 65), with section 12 and part of section 7 of that act, which relate *olely* to the *establishment of harbor lines*, will show at a glance that ne decision in 165 U. S. cannot have any possible bearing what- ver upon the questions involved in the present controversy. In ne one case—that is, in the legislation relating to bridges—it is erfectly clear, as stated by the Supreme Court in 165 U. S., that it as not the intention of Congress to deprive the States from legis- ating in regard to bridges over waters wholly within a State, but as only intended to give the Secretary of War supervisory control. By section 4 it was provided, "that whenever the Secretary of Var shall have good reason to believe that any railroad or other ridge now constructed, or which may hereafter be constructed, over ay of the navigable waterways of the United States, is an unreason-

able obstruction to the free navigation of such waters on account of insufficient height, width of span or otherwise, or where there is difficulty in passing the draw-opening, or the draw-span of
169 such bridge, by rafts, steamboats or other water craft, it shall be the duty of said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall pre-cribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

While section 5 makes it a misdem-anor upon the part of the party, corporation, association or company notified if they fail to comply with the order of the Secretary of War, and upon conviction the party so failing is punishable by a fine not exceeding $5,000, and for every month such person, corporation or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, etc.

It is perfectly clear that these sections do not attempt to take from the State all control of the subject, while section 7, still relating to bridges, provides as follows: " * * * and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works
170 over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the Legislative Assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War."

Here, again, while Congress exercises a *portion* of the power conferred by the commercial clause of the Constitution, it is manifest there is no expression of an intention upon the part of Congress to take from the States the power to authorize the construction of bridges over navigable waterways wholly within a State, but only to provide that after the erection of such bridges has been authorized by the State, the construction of the same shall not be commenced "until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War." This legislation, therefore, relating to bridges, was only a *partial* exercise of the power which Congress *might have exercised*, but did not. Clearly, according to the weight of authority, Congress, by a single line in the act, could have said—and constitutionally have said, under the power of Congress to regulate commerce—"from and after the passage of this act, no State shall exercise any control whatever in the construction of bridges or other works over or in any of the navigable waters of the United States wholly within a State." Congress, however, did not do this, in so far as it legislated in reference to bridges, hence the decision in the case of The Lake

Shore & Michigan Railway *vs.* The State of Ohio, 165 U. S.,
171 cited by counsel, while undoubtedly good law, has no application to Mr. Montgomery's case.

Mark the clearly defined difference between the provisions of the act of September 19, 1890, relating to the construction of bridges, and those of the same act authorizing the establishment of harbor lines. In the one case, the former, Congress only partially exercised the power conferred by the commercial clause of the Constitution, while in the latter the whole power was exerted.

VII.

The provisions, however, in the river and harbor act of September 19, 1890, relating to the establishment of *harbor lines*, are wholly and radically different. Here Congress exerted its *full constitutional power*, and, without any qualifications, limitations or conditions whatever, conferred upon the Secretary of War the full and unrestricted power "to cause the harbor lines to be established in any harbor, beyond which no piers, wharves, bulkheads or other works may be extended or deposits made, *except under such regulations as may be prescribed from time to time by him.*" That is, the Secretary of War.

172 These sections of the river and harbor act of September 19, 1890, relating to harbors, are *in hæc verbæ* as follows:

"SECTION 12. That section 12 of the river and harbor act of August 11, 1888, be amended and re-enacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized to, cause such lines to be established, beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, *except under such regulations as may be prescribed from time to time by him:*

"And any person who shall wilfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $1,000, or imprisonment not exceeding one year, at the discretion of the court, for each offense."

Supplement to Revised Statutes U. S., volume 1, page 803.
26 Stat., page 455.

While section 7 of the same act, and as amended by the act of July 13, 1892 (27 Statutes, 98–110) provides as follows:

"SECTION 7. That it shall not be lawful to build any
173 wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, *without the permission of the Secretary of War*, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall

obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the Legislative Assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War.

"*Provided:* That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw-bridge, bridge piers and abutments or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or
174 harbor, or other navigable water not wholly within the limits of such State."

Here, it will be observed, by section 12, *supra*, no power whatever is left to the State. The whole business of establishing harbor lines for harbors within the navigable waters of the United States, whether located wholly within a State or otherwise, was taken from the States and jurisdiction assumed by Congress.

Undoubtedly in a case where the Secretary of War has never acted, the State, through a municipal corporation or otherwise, might, prior to the passage of the above act of September 19, 1890, lawfully establish harbor lines for any harbor without consulting the Secretary of War, in reference to which all parties would be compelled by law to conform. These lines, however, if established, must give way, of course, to the superior authority of Congress, whenever the Secretary of War does act, and any harbor lines established by the State or city, under authority from the State, must give way to those established by the Secretary of War.

In the case of the Port of Portland, no action whatever had been taken either by the city, or Port of Portland establishing either harbor or wharf lines, prior to the action taken by the Secretary of War August 9, 1892.

Furthermore, since the passage of the act of September 19, 1890, *supra*, even though the Secretary of War may not have estab-
175 lished any harbor lines at a given point, no person, association or corporation could, under any authority from a city or State, lawfully build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind in any of such navigable water of the United States in such manner as would obstruct or impair navigation, commerce or anchorage of such waters, *without first obtaining permission of the Secretary of War.* This, as we have said, in cases where the Secretary had established no harbor lines. This is clear from section 7 of the river and harbor

act of September 19, 1890, as amended by the act of July 13, 1892, 27 Stat., 88–110, and under this provision it is clear that the Secretary of War may, in his discretion, in the interests of foreign, or interstate commerce, authorize the construction of a wharf *outside of established harbor lines*, even though such construction may to some extent obstruct or impair navigation, commerce or anchorage.

The following statement, therefore, in the brief of counsel for appellants, page 15: "We submit that said section 4 is as much of an assumption of *exclusive* control over *existing bridges* as section 12 is over *existing harbor lines*," is, in view of the foregoing analysis and comparison of the two sections, and of the decision of the Supreme Court in 165 U. S., not borne out by the facts.

176 The Secretary of War has authority to change and relocate harbor lines previously established by him.

VIII.

Counsel for appellants' *fourth* assignment of error (Appellants' Abstract of Record, 50) reads as follows:

"Said court erred in holding that the Secretary of War had any right in 1898 to change the harbor lines that were established in 1892."

While subdivision II of the brief for appellants, page 20, is as follows:

"The Secretary of War had no right to change or relocate established harbor lines."

The law presumes that the Secretary of War in re-establishing the harbor line, September 23, 1898, acted within his jurisdiction.

19 Am. & Eng. Ency. of Law, 43, and authorities there cited.

And so far from anything in the record showing affirmatively that the Secretary did not act within the limits of his power, there is abundant proof to show that he did, as will be shown presently.

It is submitted that the observations of the learned counsel for appellants on the word "*establishment*," to the effect that it relates exclusively to an "*inceptive and original act*" (Appellants'
177 Brief, 9) are hypercritical. Counsel say, "How can a thing be established that has been already established?" Webster defines the term "*establish*" as follows: "To enact or decree by authority; to decree; to enact; to ordain; said of laws, regulations and the like." That is to say, we establish laws, we establish regulations, we establish things of like character. But who will contend that any law or regulation or the like must, unless it indeed be those of the Medes and Persians, remain *ex necessitate* forever unchangeable, because forsooth they were once *established*. Laws are changed, regulations are changed by the same authority that established them originally. In other words, laws are changed and re-established, regulations are modified and re-established.

Webster's Dictionary, Unabridged.

United States *vs.* Eliason, 16 Peters, 291.

United States *vs.* Romard, 89 Fed. Rep., 157.

In the case *supra*, U. S. *vs.* Elliason, 16 Peters, 291, the Supreme Court of the United States in considering the act of Congress of March 3, 1835, and the order of the War Department of March 13 of the same year establishing certain rules and regulations for the government of the army, said:

"The power of the Executive to establish rules and regulations for the government of the army is undoubted. The power to
178 establish *implies necessarily the power to modify or repeal or create anew.* The Secretary of War is the legal and constitutional organ of the President for the administration of the military establishment of the nation. The rules and orders publicly promulgated through him must be received as the acts of the Executive, and as such be binding upon all within the sphere of his legal and constitutional authority."

In Gratiot *vs.* United States, 4 Howard, 80, the Supreme Court said:

"As to the army regulations this court has too repeatedly said that *they have the force of law* to make it proper to discuss or contend anew."

Upon the question as to the right and power of the Secretary of War to change and re-establish and relocate a harbor line in a harbor, after having once caused the same to be established, see the recent case of The United States *vs.* Romard, decided in the circuit court of the southern district of New York, August 4, 1898, 89 Federal Reporter, page 157, which is directly in point.

The act of Congress of June 29, 1888, as amended by the act of August 18, 1894, prohibited the deposit of refuse and other material within the harbor of New York and other waters within limits prescribed by the supervisor of the harbor. The court in passing upon this act held, *first*, that it did not unlawfully delegate any portion of the power of Congress over navigation and commerce,
179 and, *second*, that the points at which the refuse might be deposited *might be changed from time to time by the supervisor*, the court says:

"Congress did not thereby delegate to the supervisor any of its power 'to regulate commerce,' and the included control of the navigable waters of the United States. The supervisor is not authorized to declare that dumping of refuse of various kinds is obstructive or injurious to navigation and punishable. He is merely directed to overlook the detailed operation of such dumping, to the end that the deposit shall not be harmful to navigation, with the same purpose *harbor masters are authorized to designate the place of anchorage of ships, and locate and shift locations as the conditions of shipping in the harbor require.* Obviously the two houses of Congress and the Executive could not take the immediate oversight of the dumping scows, directing the deposit in one place or another as the exigencies of the day or hour demanded, and no general law could meet the mischief sought to be avoided, and hence the mere detail of protecting the harbor was committed to a subordinate officer. It is erroneously suggested that the supervisor may declare what are obstructive and injurious deposits. The act does this and the

supervisor merely designates where such deposits may be made without obstructive and injurious effects. The shifting conditions necessitate shifting places of deposit, *so that in a sense what is innocent at one hour may be offensive at another.* But that is a mere matter of police regulation whereby a public officer is authorized to command scows using the harbor to
180 adapt themselves to certain transitory conditions in the manner that may seem suitable to such officer. The act specifically provides that every scow shall be dumped only in the place or places indicated by the supervisor. *It would be strange if the United States with its power over navigable waters could not place a keeper over the same with power to decide what portion of its vast domain should receive the refuse of a great city where the propriety of selecting such portion depended on ever-changing conditions.* Such a power cannot be denied to it in the present instance as it would defeat the only practical and available means of protecting from nuisances the waters under its jurisdiction, and this may be by a sweeping enactment prohibiting all deposits in the harbor and within a certain distance thereof."

United States *vs.* Romard, 89 Fed. Rep., 157.

This case of Romard, *supra*, is directly in point, not only upon the power of Congress to authorize the Secretary of War to establish harbor lines, but also upon the question as to his power to change and relocate such lines.

The demands of foreign commerce may at certain times and in certain places demand that the riparian owner shall be permitted today to extend his wharf outside of the harbor line established ten years ago. There may be a change in the current of the stream, as is not infrequently the case, from one side of the river to the other, making it impossible for ships to connect with wharves on the old line, and thus Congress, in the exercise of the power con-
181 ferred by the commercial clause, has wisely provided for just such cases.

The Secretary of War has authority under sections 7 and 12, act 1890, to give respondent permission to extend his wharf beyond the harbor line established by him August 9, 1892.

IX.

By section 7 and 12 of the river and harbor act of September 19, 1890, the Secretary of War is clothed with power to authorize the construction of a wharf *outside* of an established harbor line. (See quoted sections, *supra.*)

Sections 7 and 12, act 1890, 26 U. S. Stat., 454–455. 27 U. S. Stat, 110.

This inhibition in section 7, *supra*, against building outside the established harbor line "without the permission of the Secretary of War" is the equivalent of a legislative declaration—

First. That the Secretary of War may in his discretion make an order permitting the building of a wharf outside of such line, and

Second. That with such permission a wharf may be lawfully co
structed, either in whole or in part, *outside* of such line.

182 And this view is confirmed by a clause of section 12
same act, which, after providing that the Secretary of W
may cause harbor lines to be established, concludes as follows: "B
yond which no piers, wharves, bulkheads or other works shall
extended or deposits made, *except under such regulations as may
prescribed from time to time by him (the Secretary of War).*" An
then the same section declares that any person wilfully violatin
any of the provisions of that section, "*or any rule or regulation ma
by the Secretary of War in pursuance of this section,*" shall be deeme
guilty of a misdemeanor, and on conviction shall be punished by
fine not exceeding $1,000.00 and imprisonment not exceeding o
year, at the discretion of the court for each offense.
Sec. 12 act Sept., 19, 1890; 26 U. S. Stat., 455.

If then, the Secretary of War has the power, as we confidentl
insist he has, to permit a wharf or pier to be extended *outside* of
harbor line established by him in pursuance of an act of Congre
passed in the execution of the power conferred by the commercia
clause of the Constitution, and if in the exercise of such power h
has made an order permitting it, what right we require, has th
State or any municipality, acting under authority from the State, t
say such wharf shall not be so built? What voice shall be obeye
that of the nation or that of the municipality?

183 Counsel for appellants in their brief, pages 24–25, conten
that by fair construction of section 7, act of 1890, *supra*, "tha
the States and individuals may do anything *inside* of harbor line
or where there are no harbor lines, which does not 'impair th
navigation, commerce or anchorage of such waters.'" (Appellant
Brief, 24–25.)

But this certainly cannot be so as this section 7 must be considere
in connection with section 12 of the same act, which, after authori
ing the Secretary of War to cause harbor lines to be establishe
says, referring to such lines:

"Beyond which no piers, wharves, bulkheads or other works sha
be extended, or deposits made, except under such regulations as ma
be prescribed from time to time by him (the Secretary of War).
(Appellants' Brief, 4.)

This it will be observed is a positive inhibition against individuals
cities and States, and the whole world. No one can extend or au
thorize the extension of any pier or wharf, beyond the harbor lin
thus established by the Secretary of War, *except under such regula
tions as may be prescribed by the Secretary of War.*

X.

Section 6 of the act of September 19, 1890, *supra*, makes it unlaw
ful "to cast, throw, empty or unlo-de, or cause, suffer, or procure t
be cast, thrown, emptied or unladen, either from or out o

184 any ship, vessel, lighter, barge, boat or other craft, or fro
the shore, pier, wharf, furnace, manufacturing establish

ments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States, which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods or otherwise, whereby navigation shall or may be impeded or obstructed."

This section provides further as follows:

"Provided, that nothing herein contained shall extend, or be construed to extend, to the casting out, unlo-ding, or depositing of any material excavated for the improvement of navigable waters, into such places and in such manner as may be deemed by the United States officer supervising said improvement, most judicious and practicable, and for the best interests of such improvements, *or to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is hereby authorized to grant, in any place designated by him where navigation will not be obstructed thereby.*"

185 Now, suppose the Secretary of War in pursuance of the authority conferred by this section, should designate some particular point or points in the navigable waters of the harbor of Portland for the dumping of the substance mentioned in the foregoing statute, and suppose subsequently to such designation by the Secretary of War, the City or the Port of Portland, should designate a certain other point or points where such matter could be dumped, and a conflict should arise between the Federal and State governments. Would this court for one moment hold that the action of the City or the Port of Portland should be sustained? Most certainly not.

What is the effect of the action of the Secretary of War in controlling harbor lines?

XI.

Now, what is the effect of this legislation, sections 7 and 12, act of September 19, 1890, in relation to the establishment of harbor lines in harbors, and of the action of the Secretary of War thereunder? Unquestionably, the purposes of such legislation being kept in view, namely, to protect harbors from encroachment, facilitate navigation and anchorage of vessels, etc., the true construction of this legislation is this: It says in substance and legal effect to all concerned—property-owners, navigators, shippers, ware-

186 housemen, wharfingers, States, towns, cities, municipalities, citizens—"Here are the established harbor lines of this harbor. These lines are established by the Secretary of War under and in virtue of a law of the United States, enacted in pursuance of

the constitutional grant of power to Congress to regulate commerce with foreign nations. Up to this line from the shore such structures, in the shape of wharves, piers, warehouses, etc., as the riparian proprietor may, as such riparian proprietor, lawfully erect, may be erected." In other words, "every right which attached to the riparian proprietor, with reference to the construction of wharves, piers, warehouses, etc., may be exercised by him up to this line. Beyond this line, however, such riparian proprietor, or any other person, shall not be permitted to go, *except* (here again is indicated the intention of Congress to assume absolute control in the matter of the location of wharves, or rather as to the limit within which they may be erected) *under such regulations as may be prescribed from time to time by him*" (the Secretary of War). In other words, it may be lawful to erect a wharf, pier, bulkhead or other works even *beyond this harbor line*, provided it is done as provided in section 12 of said act, under such regulations authorizing him to do so as may be prescribed from time to time by the Secretary of War, *or* if the *permission of the Secretary of War* is first obtained as provided in section 7 of said act.

Counsel for appellants in their brief, page 12, comment on the terms "*prescribe*" and "*regulations*," and insist that as used
187 in section 12 of the act of 1890, *supra*, the term "*regulations*" means rules which only become operative *after they are written out and published*. We quote from the brief:

"The regulations referred to are to be '*prescribed*.' To '*prescribe*' means to write beforehand. The word '*regulations*,' as here used, evidently means rules for the management of harbors *to be written out and published before they take effect!*"

We cannot believe this to be the correct interpretation of these terms as used in section 12, *supra*, but insist that the clause, taken as a whole, "except under such regulations as may be prescribed *from time to time* by him," means and was intended to mean, simply this: That whenever a natural person or a corporation or municipality shall make application to the Secretary of War for permission to extend a pier, wharf, bulkhead or other works, or to make a deposit, beyond the established harbor line, that the Secretary will then examine such particular case and either grant or refuse it; and in case he grants the permit, then to attach such conditions by prescribing such regulations as would in such case seem to be proper and reasonable.

This view is supported by the use of the words "*from time to time;*" that is, from time to time as each application is presented the Secretary shall prescribe the regulations which shall govern that case. A regulation that would be proper and applicable
188 to one case might be wholly improper and inapplicable in another, or indeed in many other cases.

In the case of Mr. Montgomery's application the Secretary *prescribed* the precise distance, varying from less than twelve feet at one end to considerably less than eighty feet at the other end, and eighty-five feet at one intermediate point, which he should be per-

mitted to extend his wharf beyond the harbor line as established August 9, 1892.

But a still further and conclusive answer can be made to the suggestions of counsel in their brief just quoted. It is perfectly clear that if the Secretary of War has power to grant a permit to extend a wharf beyond the established harbor line, coupled with a power to prescribe from time to time regulations governing the same, then he has the power, should he in any given case believe that no regulation is necessary, to grant the permit without prescribing *any* regulation. Conceding counsel's construction, therefore, of the clause to be correct, and conceding further that no such rules were ever prescribed beforehand and published, still the action of the Secretary in granting a permit, in the absence of any such regulations, would be binding.

189 Harbor lines were established at the port of Portland by the Secretary of War, August 9, 1892.

XII.

In pursnance of the twelfth section of the act of September 19, 1890 (26 Statutes of the U. S., 455, *supra*), the Secretary of War on August 9, 1892, caused the harbor lines on both sides of the Willamette river in the port of Portland to be established.

Bill of complaint, Appellant's Abstract of Record, 2. Respondent's answer (Appellant's Abstract of Record, 17–18), in which this fact is averred, and the same is not denied, in fact, appellant's counsel concede this line was so established at that date.

The acts of acting Secretary Meiklejohn are those of the Secretary of War.

XIII.

By the act of March 15, 1890, provision was made for the appointment of an Assistant Secretary of War, to be appointed by the President by and with the advice and consent of the Senate.

Supplement to the Revised Statutes, U. S., vol. 1, second edition, page 707.

190 Section 177 of the Revised Statutes, page 22, provides as follows:

"In case of the death, resignation, absence or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President, * * * perform the duties of such head until his successor is appointed, or such absence or sickness shall cease."

The Secretary of War on September 23, 1898, gave the respo
ent, Montgomery, permission to extend his wharf outside the harb
lines established by him August 9, 1892, and also at the same ti
the Secretary changed the location of said line and re-established

XIV.

In pursuance of these provisions of section 7 and 12, *supra*, t
respondent Montgomery on May 21, 1898, (Abstract of Record,
made application to the Secretary of War for an order permitti
him to extend his wharf a certain clearly defined and accurat
described distance, in length and width, *outside* the harbor l
established by the Secretary of War August 9, 1892, (Abstract
Record 31); and also praying that the harbor line thus establish
be relocated and re-established on a certain line also clea
191 defined and designated in such application. (Abstract
Record 35.)

Subsequently, on September 23, 1898, the said application of
respondent Montgomery was in all respects granted by the th
acting Secretary of War G. D. Meiklejohn by the following endo
ment on said application:

"Ninth endorsement.

"WAR DEPARTMENT, *September* 23, 1898

"In accordance with the views of the Chief of Engineers
request of Mr. James B. Montgomery will be complied with.

"(Signed) G. D. MEIKLEJOHN,
"*Acting Secretary of War.*"

And also on the same date said acting Secretary made the follo
ing endorsement upon the map accompanying and a part of s
application:

"WAR DEPARTMENT, *September* 23, 1898

"The change in harbor line shown in red hereon is approved.

"(Signed) G. D. MEIKLEJOHN,
"*Acting Secretary of War.*"

Findings of fact, Abstract, 41–42.

By these two orders, therefore, of the acting Secretary of W
both of the things prayed for by Mr. Montgomery were grant
namely:

First. Permission to construct his wharf in part *outside* of
harbor line established August 9, 1892, and

192 *Second.* The harbor line was relocated and re-establish
in front of the property of the respondent Montgomery,
the line as prayed for in his application.

Findings of fact, Abstract of Record, 42–43.

And the respondent is constructing his wharf wholly *inside* of the harbor line thus established by the Secretary of War, and in accordance with the *permission* given him by the Secretary of War.

Should we, therefore, for the present and for the sake of the argument, concede the contention of counsel for appellants, that the Secretary of War has no power to change, or re-establish a harbor line once established by him, the respondent Montgomery had by virtue of these two orders of the Secretary of War his *permission* to extend his wharf *outside* of the harbor line as originally established August 9, 1892, and as authorized by said sections 7 and 12, *supra*, of the act of September 19, 1890.

See number sixth finding of fact, Abstract of Record, 35–36.

See also original application of respondent, Montgomery, of date May 21, 1898, on file as evidence in this case.

193 Appellants' fifth assignment of error is not well founded.

XV.

Appellants's fifth assignment of error (Appellants' Abstract of Record, 50) reads as follows:

"Said court erred in holding that the facts as they appear in the pleadings and evidence gave the Secretary of War, or G. D. Meiklejohn, any jurisdiction to fix, or interfere with the harbor lines within the city of Portland."

A careful inspection of the pleadings will show that this assignment is not well founded. By a reference to the appellants' abstract of record, it will be seen that the sixth finding reads as follows, (Appellants' Abstract of Record, 50):

"That on or about May 21, 1898, the defendant, James B. Montgomery, presented his petition to the Secretary of War, in which he claimed that said harbor line, established August 9, 1892, in front of water lots 1, 2, 3, 4, 5, 6 and 7, was located too far *inland*, and at many points in water only six inches to two feet in depth, and *praying that said line in front of said lots, and for the distance as hereinafter particularly described should be relocated.* That the Secretary of War, on receipt of said application of the defendant, Montgomery, directed that a public hearing be had on the subject before Major W. L. Fisk, major corps of engineers, U. S. A., at Portland, Oregon, with the view of ascertaining whether such change in said harbor
194 lines as prayed for by defendant, and whether his prayer for permission to extend his wharf beyond the harbor line established August 9, 1892, should be granted. That such public hearing was had by Major Fisk on August 5, 1898, and pending which the petition of the defendant, Montgomery, was, on the seventh day of August, 1898, amended by him at the written request of Major W. L. Fisk, major corps engineers, U. S. A., so as to more definitely describe the change in the harbor line asked for, which amendment was embodied in a communication from the defendant, James B. Montgomery, of which the following is a copy:

"PORTLAND, OREGON, *August* 17, 1898.

"To Major W. L. Fisk, corps of engineers, in charge of river and harbor improvements.

"DEAR SIR: In reply to your letter asking for a definite location of the change in the established wharf line in front of my property in Albina, as desired by me, I would state as follows, viz:

"I respectfully ask that the established wharf line be *relocated* according to the following description:

"The prolongation northward of the present established wharf line, from the center line (produced) at Knight street, and the center line (produced) of Randolph street, to an intersection of a prolongation southward of the present established wharf line along the face of the Northern Pacific Terminal Company's dock or
195 wharf, from the intersection of said line with the center line of Russell street (produced).

"Very respectfully yours,

"J. B. MONTGOMERY."

Thus, it will be seen, everything essential to the jurisdiction of the Secretary of War was brought to his attention, and made a matter of record before him.

This application, moreover, it will be seen by the court, was in its claims two-fold in character:

First. A relocation, or re-establishment of the harbor line at the points indicated was prayed for, and reasons for the same were presented, showing clearly that it was for the true interests of the harbor of Portland that such change in the location of the harbor should be made, as it must be apparent to all that a harbor line along a navigable ship harbor which is located in water from only six inches to two feet in depth, was not properly located, the best interests of the harbor being considered, and

Second. The defendant, Montgomery, in this application, prayed for permission to extend his wharf beyond the harbor line established August 9, 1892, to a line definitely described and indicated by him in his letter to Major W. L. Fisk of August 17, 1898, as requested by Major Fisk.

Will it be seriously contended that this petition *supra* did not show clearly and conclusively on its face that the harbor
196 line as established August 9, 1892, was located entirely too far landward, the preservation and protection of the harbor being considered? And is it not a fact, furthermore, that the petition of Mr. Montgomery distinctly prayed for a *relocation* of the harbor line at said point? What more could have been said in order to bring the subject properly before the Secretary of War? And in view of the fact that the Secretary, instead of acting summarily upon said application (sixth finding of fact, Appellants' Abstract of Record, 36) "directed that a public hearing be had on the subject before Major W. L. Fisk, major, corps engineers, U. S. A., at Portland, Oregon, with the view of ascertaining *whether such change in said harbor lines as prayed for by defendant*, and whether his prayer *for permission to extend his wharf beyond the harbor line as*

tablished August 9, 1892, *should be granted;*" and in view of the further fact (sixth finding of fact, Appellants' Abstract of Record, 36) "that such public hearing was had by Major W. L. Fisk, on August 5, 1898;" and of the further fact that "the public were invited, and at which were a number of the leading business men of the city of Portland, interested in the preservation and protection of the harbor of Portland, and whose views, opinions and protests were received in writing by Major Fisk, and all of which, together with evidence submitted by Mr. Montgomery with his report, were forwarded to the Chief of Engineers of the War Department, the report of Major Fisk being adverse to such change;" and
197 in view of the further fact "that subsequently, on September 1, 1898, John M. Wilson, brigadier general, Chief of Engineers, U. S. A., made a thorough review of the report of Major Fisk, and transmitted to the Secretary of War the papers in the case" (sixth finding of fact, Appellants' Abstract of Record 35–37); we say, in view of all these things, and of the final decision made by the Secretary of War granting the prayer of the petition of the respondent in all respects, can it rightfully be said that the pleadings and evidence show affirmatively that the Secretary of War had no jurisdiction to change the established harbor lines (Appellants' Brief, 2), *or* that the *facts* before the Secretary were not sufficient to clothe him with jurisdiction to act as provided in the twelfth section of the act of 1890, *supra?* We confidently submit this court will not undertake to review the action of the Secretary of War, much less to hold that he had no jurisdiction in the premises.

Our Contention.

XVI.

Our contention, therefore, is, in view of what we have said:

First. That the defendant Montgomery has a perfect right to construct his wharf at the place and in the manner he is constructing it, such work being wholly *inside* the harbor lines as re-established and located by the Secretary of War on the
98 *th*enty-third day of September, 1898; and not any further beyond low-water mark than is necessary and convenient for the use and accommodation of vessels navigating said harbor. (Sec. 4227 Hill's Code.) And,

Second. Though there had been no change in the location of the harbor line at that point by the Secretary of War, and conceding for the argument that the harbor line as established by the Secretary of War on August 9, 1892, is the correct one, even then the Secretary of War had jurisdiction and power under the law (sections 11 and 12, river and harbor act of September 19, 1890) to authorize Mr. Montgomery to construct his wharf *beyond said line*, and this permission has been given by the Secretary of War on Mr. Montgomery's application. Therefore, in any event, or upon any construction of the recent action of the Secretary of War, Mr. Montgomery has authority under and in virtue of the act of Congress

just cited, and of the action of the Secretary of War and of section 4227 Hill's Code, to construct his wharf at the place and in the manner he is constructing it, and neither the State of Oregon, the City of Portland, nor the Port of Portland has any jurisdiction or right whatever, either through the courts or otherwise, to restrain or interfere with the construction thereof.

Counsel for appellants cite the case of Illinois Central R. R. Co. vs. State, 146 U. S., 387. But it is not believed that anything decided in that case can give support to any one of the propositions
199 involved in the contention of the attorneys for the appellants.

The principal question involved in that case was as to the precise character of the ownership of the State in lands under the navigable waters of the great lakes, the court dividing, a majority of the court holding that the title to such lands which the State holds, is one held in trust for the people of the State, that they may enjoy the navigation of the waters and carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties, and that it is therefore a title different in character from that which the State holds in lands intended for sale. While the minority of the judges dissenting—Justices Shiras, Gray and Brown—held to the doctrine that the ownership of the State in the lands underlying its navigable waters is as complete, and its power to make them the subject of co-veyance and grant, is as full as such ownership and power to grant in the case of the other public lands of the State. This was the great overshadowing controversy in that case. Of course there were a number of other incidental questions, but we are unable after a careful examination to find that anything decided in that case can be of any avail to the appellants in the suit at bar.

200 The twelfth section of the river and harbor act of September 19, 1890, authorizing the Secretary of War to establish harbor lines, is constitutional.

XVII.

As bearing upon the question of the power of Congress to confer upon the Secretary of War the powers conferred by the twelfth section river and harbor act of September 19, 1890 (26 U. S. Stat., 455) we submit the following propositions:

It is true that the sovereign power to make national laws is vested in Congress, and as a general rule it is a settled maxim in constitutional law that this power cannot be delegated, that is, that "power to whose judgment, wisdom and patriotism this high prerogative has been entrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved." (Cooley, Constitutional Limitations, 137.)

But this rule, however, applies only to powers which are *strictly* and *exclusively* legislative, and there is a wide range of subjects which may be regulated by direct legislation, in which a general

provision may be made, and power given to those who are to act under such general provisions to fill up the details.

See remarks Chief Justice Marshall, Wayman *vs.* Southard, 10 Wheat., 43.

It is, therefore, upon this principle that the provision of the
201 judiciary act, which empowered the Federal courts to adopt rules of practice and forms of procedure, is held to be a valid delegation, although the discretion conferred is *quasi* legislative.

Wayman *vs.* Southard, 10 Wheat., 43.

Sutherland St. Const., sec. 68.

So the power of the Secretary of War to prescribe rules and regulations for governing the army, and like authority in the Secretary of the Navy over his department, have been sustained, and within their sphere of action the regulations have the "*force of law.*"

U. S. *vs.* Eliason, 16 Peters, 291.

Gratiot *vs.* U. S., 4 How., 80.

Smith *vs.* Whitney, 116 U. S., 167.

Tilley *vs.* Railroad Co., 5 Fed. Rep., 641.

Railroad Co. *vs.* Dey, 35 Fed. Rep., 866.

In re Griner, 16 Wis., 447.

U. S. *vs.* Ormsbee, dist. ct., southern dist. Wis., May 9, 1896, 74 Fed. Rep., 209.

While the legislature cannot delegate its power *to make a law*, it can make a law to delegate a power *to determine some fact or*
202 *state of things*, upon which the law makes, or intends to make, its own action dependent.

Field *vs.* Clarke, 143 U. S., 649–693.

Locke's Appeal, 72 Penn. St., 491.

The following authorities fully support the proposition that Congress had a constitutional right to confer upon the Secretary of War the powers and duties prescribed by the river and harbor act of September 19, 1890.

United States *vs.* Eliason, 16 Peters, 301.

Gratiot *vs.* United States, 4 How., 80.

Tilley *vs.* Railroad Co., 5 Fed. Rep., 641.

Railroad Co. *vs.* Dey, 35 Fed. Rep., 866.

In re Griner, 16 Wis., 447.

United States *vs.* Ormsbee, U. S. dist. ct., southern dist. Wis., decided May 9, 1897, 74 Fed. Rep., 209.

Miller *vs.* Mayor of New York, 109 U. S., 385.

United States *vs.* City of Moline, U. S. dist. ct., northern dist. of Ill., 82 Fed. Rep., 596.

United States *vs.* North Bloomfield Gravel Mining Co., U. S. cir. ct., northern dist. of Cal., 81 Fed. Rep., 253.

United States *vs.* Romard, *et al.*, 89 Fed. Rep., 156.

Fallbrook Irrigation Dist. *vs.* Bradley, 164 U. S., 112.

203 In the case of Miller *vs.* Mayor, etc., of New York., 109 U. S., 385, the question as to the constitutional power of Congress to confer upon the Secretary of War the duties, or similar duties, to those conferred upon him by the river and harbor act of September 19, 1890, came up for consideration by the Supreme Court of the United States.

In that case, Congress had passed an act (15 Statutes U. S., 336) authorizing the construction of a bridge over the East river, between the cities of New York and Brooklyn, and declaring that when completed it should be a lawful structure, etc. The second section was as follows:

"That the Secretary of War is hereby authorized and directed, upon receiving the said plan and map and other information, and upon being satisfied that a bridge built on such plan and at said locality will conform to the prescribed conditions of this act, not to obstruct, impair or injuriously modify the navigation of said river, to notify said company that he approves the same, and upon receiving such notification such company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But until the Secretary of War approve the plan and location of said bridge, and notifies said company of the same in writing, the bridge shall not be built or commenced; and should any change be made in the plan of the bridge during the progress of the work thereon, such change shall be subject likewise to the approval of the Secretary of War."

204 It was contended by the plaintiff in that case, who sought to restrain the building of the bridge, that Congress could not leave it to the Secretary of War to determine whether the proposed construction would be an obstruction to the navi-tion of the river, but the court answered in this language:

"By submitting the matter to the Secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the Secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain meas-

205 ures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The

execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will, must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. South Carolina *vs.* Georgia, 93 U. S., 13."

Miller *vs.* Mayor, etc., New York, 109 U. S., 393.

The Supreme Court of the United States in Fallbrook Irrig. Dist. *vs.* Bradley, 164 U. S., 112, said:

"Legislative power is not delegated by enacting conditions upon the performance of which the irrigation district shall be regarded as organized within the boundaries fixed by a board of supervisors after a hearing and vote of electors therein in favor of the incorporation."

It was said by the supreme court of the State of Indiana, in State *vs.* Gerhardt, 145 Ind., 439 (44 N. E. Rep., 469):

"That an act allowing a majority of voters of a township or ward by a remonstrance to prevent the granting of licenses to sell
206 intoxicating liquors, is not unconstitutional as permitting them to suspend the operation of a general law."

The river and harbor act of September 19, 1890, conferring certain powers on the Secretary of War, has been held to be constitutional by Judge Grosscup, in the circuit court of the United States for the northern district of Illinois.

In the case *supra* of the United States *vs.* City of Moline, 82 Federal Reporter, 596, *supra*, Judge Grosscup, after citing the case of The United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178, where it was held that inasmuch as the bridge had been fixed by an act of Congress, and was therefore a lawful structure, it was not within the power of Congress to delegate to the Secretary of War power to change such status, but that such power to change, whatever it might be, was exercisable only by Congress itself, and the case of The United States *vs.* Rider, 50 Federal Reporter 406, where the court (Judge Sage) held that the notice given to provide a draw-span in the bridge was unreasonable, *held* that the river and harbor act of September 19, 1890, conferring power and imposing certain duties upon the Secretary of War, is constitutional.

In the case of Chicago & Northwest Railway Co. *vs.* Dey,
207 *et al.*, railway commissioners, the circuit court of the United States for the southern district of Iowa, held:

"That the provisions of the act of the Iowa legislature of April 5, 1888, to regulate railroad corporations and other common carriers, and to increase the powers and further define the duties of the State board of railroad commissioners, and to prevent and punish extortion and punish unjust discriminations, which authorizes said board to make and enforce a schedule of rates for railroad charges, are not unconstitutional as an attempted delegation of legislative power."

Chicago & Northwestern Railway Co. *vs.* Dey, 35 Fed. Rep., p. 866.

To the same effect are the following cases:
State *vs.* Railroad Co., 37 N. W. Rep., 782.
State *vs.* Railroad Co., 35 N. W. Rep., 118.
Tilley *vs.* Railroad Co., 5 Fed. Rep., 641.
Stone *vs.* Trust Co., 116 U. S., 307.
State *ex rel. vs.* George, 22 Oregon, 142.

The following cases having reference to the powers of the *the* Secretary of War to make rules and regulations in regard to the army and the management of canals, are analogous, instructive and conclusive.

208 In case *In re* Griner and others, 16 Wisconsin, 447, the supreme court of that State held that an act of Congress giving the President power to make all necessary rules and regulations to carry into effect the law for calling out the militia is not a delegation of the legislative power of Congress, the court saying:

"The making by the President of rules and regulations for calling forth and drafting the militia is not an exercise of a power *strictly* and *exclusively* legislative. A distinction exists between those important subjects which must be entirely regulated by Congress, and those of less necessity, in reference to which a general provision is made and power is given to those who act under it to fill up the details as incidental to its execution."

In the case of The United States *vs.* Ormsbee, 74 Fed. Rep., 209, the district court of the United States for the southern district of Wisconsin, held May 9, 1896:

"That the grant by Congress by the act of August 17, 1894, to the Secretary of War, of authority to prescribe such rules and regulations for the use, administration and navigation of canals, etc., owned or operated by the United States, as in his judgment public necessity may require, *was not invalid as a delegation of legislative power;* and the rules made pursuant thereto have the force of law, so that persons violating the same by drawing off water from

209 the canal are subject to criminal punishment under the provisions of the same act."

There are on the statute books today almost innumerable cases of Congress conferring upon the Secretary of War powers very similar to that conferred by the twelfth section of the act of 1890, *supra.* For instance, in the deficiency act of March 9, 1891, (26 U. S. Statutes at Large, pages 800–868) there is the following provision:

"That the action of the Commissioners of the District of Columbia in heretofore granting permits for the extension of any building or buildings, or any part or parts thereof, in the city of Washington, in the District of Columbia, *beyond the building line*, and upon the streets and avenues of said city, is hereby ratified, without prejudice, however, to the legal rights of the Government in the event of destruction by fire, or otherwise, of any such structure. And hereafter no such permits shall be granted, except upon special application, and with the concurrence of all of said Commissioners *and the approval of the Secretary of War.*"

By this section, therefore, the whole power for issuing permits for

any building *beyond the established building line* is vested in the Secretary of War. This is but one of many very similar acts that might be cited.

Again by section 4 of the river and harbor act of August
210 17, 1894, (Supplement to the Revised Statutes of U. S., vol. 2, page 250), it is provided as follows:

"SECTION 4. That it shall be the duty of the Secretary of War to prescribe such rules and regulations for the use, administration and navigation of any or all, canals, and similar works of navigation, which now are, or hereafter may be owned, operated or maintained by the United States, as in his judgment public necessity may require. Such rules and regulations shall be posted in conspicuous and appropriate places for the information of the public, and every person and every corporation which shall knowingly and wilfully violate such rules and regulations, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding $500.00, or by imprisonment in the case of a natural person, not exceeding six months, in the discretion of the court." This is the section held to be constitutional in U. S. *vs.* Ormsbee, 74 Fed. Rep., *supra*.

Another illustration in point is the act of March 1, 1893, to create the California debris commission and regulate hydraulic mining in the State of California.

Supplement to the U. S. Revised Statutes, vol. 2, p. 95–100.

This act further shows the extent to which Congress legislates upon the subject of navigable waters of the United States.

211 *Appellant's Authorities Reviewed.*

XVIII.

Counsel insist (Brief for Appellants, page 1) that section 12 of the act of Congress of 1890 (27 Statutes, 88), is unconstitutional, and in support of this contention cite the following authorities:

Article X., amendments to the Constitution.
United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178.
U. S. *vs.* Rider, 50 Fed., 406.
County of Mobile *vs.* Kimball, 102 U. S., 699, 702.
Gilman *vs.* Philadelphia, 3 Wall., 726.
Willamette Bridge Co. *vs.* Hatch, 125 U. S., 1.
Gloucester Ferry Co. *vs* Pennsylvania, 114 U. S., 196.
U. S. *vs.* Bailey, 1 McLean, 240.
Mining Debris cases, 9 Sawyer, 497.

We will carefully consider each of these authorities and their bearing respectively upon the propositions submitted.

It is conceded, of course, that the virtue of the tenth amendment to the Constitution of the United States, all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.
212 Upon this proposition there can be no controversy between counsel and ourselves.

Now as to the case of The United States *vs.* Keokuk & H. Brid
Co., 45 Fed. Rep., 178, a careful examination of that case will
velop the fact that the question involved was simply this: Th
where Congress has authorized the construction of a bridge ov
navigable waters of the United States, the same to be construct
according to certain plans, and a certain height, and with certa
spans, and the same *has been so constructed*, that then a subsequ
general act of Congress authorizing the Secretary of War to decl
bridges to be an obstruction to navigation, and authorizing him
direct a change in their construction, or their total removal, to
followed by a penalty after notice in the case of refusal, *cannot ap*
to a bridge so previously constructed under a specific act of Congress.

The decision of the court in that case was not to the effect,
stated by counsel in their brief, that the act of Congress of 18
conferring these powers upon the Secretary of War was unconsti
tional, but was simply to the effect that the act did not apply to
case where the bridge had been previously constructed in strict
cordance with the plans and specifications authorized by a speci
act of Congress.

The authority, therefore, it will be seen at a glance, h
213 no possible bearing upon the question as to the constituti
ality of the twelfth section of the act of Congress of 1890 n
under consideration.

The decision in the case of United States *vs.* Rider, next cited
counsel in their brief in support of the unconstitutionality of t
act of 1890, (50 Fed. Rep., 406) is based wholly upon the case
United States *vs.* Keokuk & H. Bridge Company, 45 Fed. Re
supra, and is in all respects a parallel case, except that the brid
in this latter case sought to be interfered with had been construct
previously by virtue of a grant from the State of Ohio under
act of the legislature of that State of March 25, 1870, the brid
being over the Muskingum river. The extent of the holdings
the two cases being simply that the authority conferred upon t
Secretary of War did not authorize him to interfere with bridg
then legally constructed.

The next case cited by counsel in support of the unconstituti
ality of section 12 of the act of 1890, is that of the County of Mob
vs. Kimball, 102 U. S., 691. This case, like the other, not only h
no possible bearing upon the question of the constitutionality
unconstitutionality of the twelfth section of the act of 1890, but i
case directly in line in support of the contention of the respond
in this case; the court holding in that case, opinion by Mr. Just
Field, that the power conferred upon Congress by the comme
clause of the Constitution is *exclusive*, so far as it relates
214 matters within its purview, which are *national* in their ch
acter and admit of, or require *uniformity of regulation aff*
ing all the States; that that clause of the Constitution was adopt
in order to secure such uniformity against discriminating St
legislation.

The court held further that commerce with foreign countries a
among the several States, strictly construed, constitutes intercou

and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities, and to regulate it as thus defined there must be only one system of rules applicable alike to the whole country, which Congress alone can prescribe. That Congress by its non-action in such matters virtually declares that for the time being, *and until Congress deems fit to act*, the State may legislate touching matters *either local* in their nature or operation, or intended to be *mere aids to commerce*, for which special regulations can more effectually provide, such as harbor pilotage, beacons, buoys, and the improvements of harbors, bays and navigable rivers within the State, if their free navigation under the laws of the United States be not thereby impaired. The court therefore held in that case that the act of the State of Alabama entitled, "An act to provide for the improvement of the river, bay and harbor of Mobile," approved February 16, 1867, was not in conflict with the Constitution, *as it was not in antagonism with any act of Congress on the same subject.*

215 The next case cited by counsel in appellants' brief is that of Gillman *vs.* Philadelphia (3 Wallace, 713): This case, like the others quoted, holds to the doctrine that, in the *absence of the exercise of jurisdiction upon the part of Congress*, a State may regulate commerce over navigable waters of a river wholly within the State; but to use the language of the court: "Congress may interpose whenever it shall be deemed necessary, by either general or special laws. They may regulate all bridges over navigable waters, remove offending bridges and punish those who shall thereafter erect them. Within the scope of their authority both the legislative and judicial power of the nation are supreme."

In that case, which related to the construction of a bridge over the Schuylkill river, in the city of Philadelphia, there had been no exercise upon the part of Congress of its power to regulate commerce upon that river. We are wholly unable, however, to find anything in this case that can give any support whatever to the contention that section 12 of the act of September 19, 1890, is unconstitutional, while the whole theory of the case gives support to its constitutionality.

Again counsel cite us the case of the Willamette Bridge Co. *vs.* Hatch, 125 U. S., 1.

The answer to that authority is simply this: Both the bridge authorized to be built by the State, and the decision of the court referred to, were all prior to the passage of the river and har-

216 bor act of 1890, in which Congress took jurisdiction. But, even now, we concede that in so far as the erection of a bridge across the Willamette river is concerned, the State has the right to *authorize* its construction, and also has the right *to construct it*, provided, that after authorizing its construction the plans are submitted to the Secretary of War and receive his approval before the work is commenced. This is the effect of the decision in 165 U. S., quoted by counsel, and so far from being an authority against us is really in our favor, as we have already shown that in the case of the erection of bridges Congress only exercised a *portion* of the

power it might have exercised, while in the case of the establis
ment of harbor lines it exercised the *full power* Congress could exe
cise under the commercial clause of the Constitution of the Unit
States.

Counsel then cite the case of the Gloucester Ferry Co. *vs.* Phil
delphia, 114 U. S., 196. This case has been already cited in o
brief in support of our contention. There is nothing in it from b
ginning to end which will support the theory of counsel for appe
lants that the act of 1890 is unconstitutional.

Counsel next cite the ancient case of United States *vs.* Bailey,
McLean, 234, decided sixty-five years ago, in support of the uncons
tutionality of the twelfth section of the act of 1890. The simple que
tion determined in that case was this: That the crime of murd
charged against a white man for killing another white man i
217 the Cherokee country, but within the State of Tennessee, cou
not be punished in the courts of the United States. Th
court held that while Congress had power "to regulate commer
with the Indian tribes," this power did not authorize Congress
pass a law authorizing the Federal courts to entertain jurisdictio
of the case of murder, committed by one white man killing anoth
white man in the Cherokee country, that country at that time lyi
wholly within the State of Tennessee, and that therefore the act
1817, (3 Statutes, 383), which assumed to exercise a general jurisdi
tion over Indian countries *within a State* was unconstitutional an
would have no effect.

McLean, circuit justice, in deciding the case, said:

"Congress have power to regulate commerce among the sever
States; and if the same power given in the same words in relatio
to Indians may be exercised as contended, why may not Congre
legislate on crimes for the States generally. That Congress have
such general power is a proposition too clear for demonstratio
The thing itself is so palpable that it is susceptible of no demonstr
tion. The act in question provides for the punishment of a crim
committed by one citizen upon another, wholly disconnected fro
any intercourse with the Indians."

The decision in that case, while undoubtedly good law, ce
tainly has no application to the questions now before the cou
218 Counsel cite the Mining Debris cases, 9 Sawyer, 441. B
here again counsel are unfortunate as the authority, if it c
have any bearing whatever upon the case at bar, is directly again
the contention of counsel for appellants.

Judge Deady, in his concurring opinion with Judge Sawyer, pa
547, says:

"By section 3 of the act admitting the State into the Union (
Statutes, 452), it is declared 'that all the navigable waters with
the State shall be common highways.' If these words mean an
thing, the State is thereby restrained from obstructing or authori
ing obstructions to the navigation of the Feather and Sacrament
which shall prevent their being used as common highways accor
ing to their capacity and condition when the State was admitted

The opinions of both Judges Sawyer and Deady, from beginning to end, recognize the doctrine for which we are contending.

It must be borne in mind, furthermore, that section 9 of the act of August 11, 1888, which was under consideration and discussed by the courts in the cases of The United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178, *supra*, and in the case of The United States *vs.* Rider, 50 Fed. Rep., 406, *supra*, was not even a part of the act of September 19, 1890, the twelfth section of which is now under consideration, and it must, furthermore, be perfectly apparent to both counsel and court that there is a very material differ-
219 ence between the character and purposes of the ninth section of the act of August 11, 1888, and the twelfth section of the act of September 19, 1890.

It is true the twelfth section of the act of September 19, 1890, now under consideration, was also the twelfth section of the act of August 11, 1888, and the same was carried forward into the act of 1890, as was also the ninth section of the act of 1888, both sections being amended in the act of 1890. The ninth section was amended with the evident purpose of eliminating the objections urged in the courts to that section, while the amendment to the twelfth section was made with no such purpose, as that section had never been questioned, and was intended mainly to include, in the character of structures which should not be erected beyond the established harbor lines, except under such regulations as might be prescribed from time to time by the Secretary of War—not only "*piers*" and "*wharves*," as in the original section, but also "*bulkheads* and *other like works*," and also for the purpose of declaring any person who should violate the provisions of the twelfth section guilty of a misdemeanor, and subjecting him on conviction, to a fine not exceeding one thousand dollars, or imprisonment not exceeding one year at the discretion of the court.

For the information and convenience of the court we here quote the two sections, 9 and 12, of the act of August 11, 1888, and then quote the same as amended in the act of September 19, 1890.
220 As amended the portions eliminated from the original sections are in parenthesis and *italics*, while the new matter inserted in the amendments are in ROMAN.

Section 9 of the act of August 11, 1888.

"SECTION 9. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge, now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States, is an obstruction to the free navigation of such waters, by reason of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the raft span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary to give notice to the persons or corporations owning or control-ing such bridge to so alter the same as to render navigation through or under it free, easy and unobstructed; and in giving such notice he shall prescribe in each case a reasonable time in which such alteration is to be

made. If, at the end of such time, the alteration has not been m
the Secretary of War shall forthwith apprise the Attorney Gen
of the United States, whose duty it shall be to institute suit, in
name of the United States, without delay, in the circuit or dis
court of the United States for the circuit in which such brid
located, which court is hereby invested with jurisdiction
221 this purpose to recover from the owners or managers of
bridge the fines mentioned in the succeeding sections of
act."

25 U. S. Statutes at Large, 424.

Section 9 of the act of August 11, 1888, as amended by section
the act of September 19, 1890.

"That whenever the Secretary of War shall have good reaso
believe that any railroad or other bridge, now constructed, or w
may hereafter be constructed over any of the navigable waterw
of the United States, is an UNREASONABLE obstruction to the
navigation of such waters (*by reason*) ON ACCOUNT of insuffic
height, width of span or otherwise, or where there is difficult
passing the DRAW-OPENING (*draw-span*) or the DRAW-SPAN (*raft-s*
of such bridge by rafts, steamboats, or other water craft, it shal
the duty of the said Secretary, FIRST GIVING THE PARTIES REA
ABLE OPPORTUNITY TO BE HEARD, to give notice to the person
corporations owning or controlling such bridge so to alter the s
as to render navigation through or under it REASONABLY free, e
and unobstructed; and in giving such notice he SHALL SPE
THE CHANGES REQUIRED TO BE MADE, and shall prescribe
each case a reasonable time in which (*such alteration i*
be made) TO MAKE THEM. If at the end of such
222 the alteration has not been made, the Secretary of
shall forthwith (*apprise the Attorney General of the United S*
whose duty it shall be to institute suit, in the name of the United States,
out delay, in the circuit or district court of the United States for the
cuit in which such bridge is located, which court is hereby invested
jurisdiction for those purposes to recover from the owners or mana
of such bridge the fines mentioned in the succeeding sections of this
NOTIFY THE UNITED STATES DISTRICT ATTORNEY FOR THE DIST
IN WHICH SUCH BRIDGE IS SITUATED, TO THE END THAT
CRIMINAL PROCEEDINGS MENTIONED IN THE SUCCEEDING SECT
MAY BE TAKEN."

Supplement to the Revised Statutes, vol. 1, 800.
26 Stat. U. S., 453.

Section 12 of the act of August 11, 1888.

"SECTION 12. Where it is made manifest to the Secretary of
that the establishment of harbor lines is essential to the prese
tion and protection of harbors he may, and is hereby authorize
cause such lines to be established, beyond which no piers or wha
shall be extended or deposits made, except under such regulat
as may be prescribed from time to time by him."

25 Stat. U. S., 425.

223 Section 12 of the act of August 11, 1888, as amended by section 12 of the act of September 19, 1890.

"SECTION 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized to cause such lines to be established, beyond which no piers [*or*] wharves, BULKHEADS OR OTHER WORKS shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him."

"AND ANY PERSON WHO SHALL WILFULLY VIOLATE THE PROVISIONS OF THIS SECTION, OR ANY RULE OR REGULATION MADE BY THE SECRETARY OF WAR IN PURSUANCE OF THIS SECTION, SHALL BE DEEMED GUILTY OF A MISDEMEANOR, AND, ON CONVICTION THEREOF, SHALL BE PUNISHED BY A FINE NOT EXCEEDING ONE THOUSAND DOLLARS, OR BY IMPRISONMENT NOT EXCEEDING ONE YEAR, AT THE DISCRETION OF THE COURT FOR EACH OFFENSE."

Supplement to Revised Statutes, vol. 1, 803.
26 Stat. U. S., 455.

The case of the United States *vs.* Romard, *et al.*, decided August 4, 1898, by the circuit court for the southern district of New
224 York, 89 Fed. Rep. 156, is directly in point upon the question that section 12 of the act of 1890, *supra*, conferring certain powers on the Secretary of War, is not a delegation of legislative powers, and in support of the constitutionality of such sections.

In that case, Congress, by the act of June 29, 1888, as amended by the act of August 18, 1894, (28 Stat. at Large) sought to prevent the deposit of destructive and injurious deposits within the tide waters of the harbor of New York, section 1, prohibits "the deposit of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid or any other matter of any kind, other than that flowing from streets and sewers, and passing therefrom in a liquid state, in the tide-waters of the harbor of New York * * *." While section 3, requires persons proposing to "take or tow such forbidden matter to a place of deposit, to apply for and obtain from the supervisor of the harbor, appointed hereunder, a permit defining the precise limits within which the discharge of such scows or boats may be made," and any deviation from such dumping or discharging place specified in such permit is declared to be a misdemeanor within the meaning of the act. Romard and others were indicted under this act for dumping at a place other than one of those prescribed in the permit issued by the supervisor of the harbor, and it was contended that while Congress had power to prescribe such limits, it could not authorize the supervisor of the harbor to fix the same, for the reason, as is claimed in the case at bar, that that would
225 be a delegation of legislative power. The court, however, held differently and sustained the constitutionality of the act.

It was insisted also in that case as in this case that it fell within the principles enunciated in the case of United States *vs.* Keokuk &

H. Bridge Co., 45 Fed. Rep., 178, *supra*, but the court, after citing the opinion in the above case, said:

"In that case Congress had specifically authorized the bridge company to construct a bridge, and it did not appear that the construction was in violation of the terms of authorization, and the essential holding is that Congress cannot delegate to a subordinate discretionary authority to nullify the act and the construction of the bridge pursuant to it. The opinion does not suggest that the United States in its constitutional control of navigable waters cannot establish police regulations intended to prevent the deposit of material which would tend to create an obstruction to the waterway, and authorize a governmental officer to supervise the manner of discharging refuse and to designate the location of such deposit."

The court, discussing the case further upon the question as to the power of Congress to confer such powers upon the supervisor of the harbor, said:

"Congress did not thereby delegate to the supervisor any of its powers 'to regulate commerce' and the included control of the navigable waters of the United States."

United States *vs.* Romard *et al.*, 89 Fed. Rep., 156.

226 This case is also directly in point upon the question as to the jurisdiction of Congress over the navigable waters of the United States.

This court in Deane *vs.* Willamette Bridge Co., 22 Oregon, 167, said:

"In passing upon the constitutionality of a law, an intent to violate the Constitution is not to be presumed in any case; and every doubt is to be solved, and every intendment given in favor of the constitutionality or the statutes."

Deane *vs.* Willamette Bridge Co., 22 Oregon, 167.

"The decision of a question involving the constitutionality of an act of the legislature," says Mr. Chief Justice Marshall, "is one of the gravest and most delicate of judicial functions; and while the court will meet the question with the utmost fairness when its decision is indispensable, it is the part of wisdom and a just respect for the legislature to waive it if the cause in which it arises can be decided on other points."

Ex parte Randolph, 2 Brock., 448.

Elliott *vs.* Oliver, 22 Oregon, 47.

While the courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics; they will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more
227 proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extrajudicial disquisition is entitled."

Hoover *vs.* Wood, 9 Ind., 287.

Elliott *vs.* Oliver, 22 Oregon, 48.

Courts in passing upon the constitutionality of a statute must, if there is any reasonable doubt, sustain the statute, without regard to consequences.

People *vs.* Harper, 91 Ill., 357.
Nickerbocker *vs.* People, 102 Ill., 218.

Where the construction of a statute regulating a branch of the public service is doubtful, the court should adopt the construction acted on by the department.

Matthews *vs.* Shores, 24 Ill., 27.

Should the court, therefore, be of the opinion that there is any doubt about the constitutionality of the twelfth section, *supra*, it will adopt the construction of the Secretary of War affirming its constitutionality.

228 The power of the city or the port of Portland to establish harbor or wharf lines ceases when the National Government acts. There must be no conflict. In this case there is a conflict.

XIX.

But counsel for appellants, while virtually conceding the rightful establishment of the harbor lines on August 9, 1892, by the Secretary of War, insist that the act of the city in also establishing a harbor line is not in conflict with the act of the Secretary of War for the reason it adopted the same line.

We might concede, and, in fact do, that there was nothing unlawful in the city adopting as the wharf line the harbor line established by the Secretary of War, but we confidently insist that, inasmuch as the only reason why such line was not absolutely inoperative, is because it did not conflict with the line established by the Secretary of War; therefore, whenever the harbor lines were changed by the Secretary of War, as they were, in the exercise of his unquestionable power, on September 23, 1898, then the wharf line established by the city, in so far as it conflicts with such line as relocated by the Secretary of War, must give way. It is impossible that *two* harbor or wharf lines, one established by the National Government, and the other by the State government, can exist lawfully in the same harbor at the same time; much less is it possible, under any proper construction of the powers of the respective gov-
229 ernments—National and State—that there can be, as insisted by plaintiffs in this case, *three* different harbor lines existing at the same time in the same harbor, one established by the National Government, one by the City of Portland, and another by the Port of Portland.

If it be true as contended that the City of Portland, and the Port of Portland, each has jurisdiction and power to establish harbor or wharf lines, and if it be true as averred in the bill of complaint that each has established such lines, the city Dec. 12, 1892, and the Port of Portland Nov. 2, 1898, then there is nothing to prevent them from establishing *different* and *conflicting* lines, and the fact that they

both in this instance adopted the same line—and *that* the line first established by the Secretary of War, is no argument in favor of their jurisdiction or power. If each municipality has power to establish a line as contended by counsel, then the power exists to establish on *different locations*, and also on lines neither of which may be on the line established by the Secretary of War, and hence we might have *three* different harbor lines all conflicting.

Counsel for plaintiffs insist that the only purpose or effect of the establishment of harbor lines by the Secretary of War is to fix a line beyond which, if wharves or piers are built they will be deemed to be obstructions to navigation, and, therefore, a public nuisance, and that therefore, the State, or city acting under the State, or the
230 Port of Portland, acting under the State, either one or both, may fix a line *inside* of such harbor line so fixed by the Secretary of War, beyond which a wharf shall not be built without being deemed in law an obstruction to navigation, and therefore a public nuisance. The contention, if the court please, cannot be maintained for one moment. The idea is based upon an absolutely false assumption as to the purposes of Congress in establishing a harbor line. What are these purposes? They are twofold in character. One purpose, it is true, is to fix a line beyond which wharves, piers, etc., shall not be built, but another equally important purpose is to establish a line sufficiently near the ship channel, or deep water, so as to enable those who are riparian owners or otherwise who have the right to build wharves, docks and warehouses, to connect these wharves, docks and warehouses, with ocean vessels. This is a regulation of commerce, and one with which no State can interfere. When this line is established, under authority of Congress, no State or city can establish another line which will prevent the building of wharves and warehouses up to the harbor line so established by direction of the General Government. Any other rule would place it within the power of a State to keep open a strip of land and water the entire length of the harbor, between the line established by Congress, and beyond which towards the land ships could not come, and the line thus established by the State or by the city, or the Port of Portland, under authority from the State. The wharves, docks and warehouses in the city are as essential
231 adjuncts in the carrying on of foreign commerce as are ships and pilots and sailors. Any legislation that denies the construction of any of these up to the harbor line established by Congress, is in direct conflict, therefore, with what has been done by Congress, and is therefore an attempted interference with the jurisdiction and power of Congress to regulate commerce among the States and with foreign nations, and is unconstitutional and void.

Such a power in the State might prove wholly destructive of the commerce of the city. It cannot be successfully denied that a declaration of the General Government that no wharf or pier shall be constructed beyond a certain established line is not in substance and legal effect a declaration upon the part of Congress that it shall be lawful to construct wharves, piers and warehouses for the benefit of commerce and in the aid of commerce up to such line.

And if this is so, what jurisdiction or power has the State to declare that it shall not be lawful to construct these aids to foreign commerce up to such line. And when Congress has declared, as it has done in the act of 1890, that the Secretary of War may authorize and consent to the location of wharves and piers beyond a certain established line, what jurisdiction or power, we inquire of the court, has the State to say, either through the City of Portland or the Port of Portland, as is claimed by the plaintiffs here, that no wharf or pier shall be built within eight, ten, twenty or one hundred
232 feet of such line, much less beyond it? The idea that there can be two harbor lines, or three harbor lines, as is possible under the theory of the plaintiffs in this case, established in any city, one by the National Government, the other one or two by the State government, is simply preposterous.

Section 12 of the act of 1890, is a "*regulation of commerce.*" It provides that under certain conditions a certain harbor line shall be established. The Secretary of War is authorized to fix the location of such line. The act of Congress, however, not the Secretary of War, declares that *beyond* that line wharves shall not be constructed. This, it is submitted, is the equivalent of a legislative declaration that it shall be lawful in the interest or interstate and foreign commerce, to construct wharves up to such line, to the end that the ship and the wharf—as absolutely required by the necessities of foreign and interstate commerce—may come together, in order that *foreign* and *interstate cargoes* may be loaded and unloaded from the one to the other.

Counsel in their brief, paragraph IV, page 3, say: "The mere establishment of a harbor line does not deprive the State of the right to regulate and control navigable waters *within* that line," and one authority only is cited in support of the proposition, that of People *vs.* Williams, 64 Cal., 499.

An examination of this case will show in a moment that it has absolutely no bearing whatever upon the case at bar. The
233 court in that case, page 499, said:

"There is no doubt of the right of a State to control and regulate the use of navigable waters within its boundaries, *subject only to restrictions upon the right arising out of the power of Congress over commerce*, but it is claimed by the defendant that the State has by legislation surrendered its right over the *water highway* in question to the city and county of San Francisco."

Now, in that case there had been no restraint whatever placed upon the right of the State by Congress, and it was simply a question whether the right of the State to regulate the public use of the *navigable waters in question* had been taken away by the establishment of the harbor lines by the State. The court held that it had not, inasmuch at the sixth section of the act establishing the harbor lines provided as follows: "Nothing in this act shall be construed as a surrender by the State of its right to regulate the construction of wharves, or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor of San Francisco."

The sole point, therefore, decided in that case, was simply this: That the statute of the State of California passed March 26,
1851, granting to the city of San Francisco the tide-covered lands known as the beach and water lots, and which es-
234 tablished a permanent water front for the city, did not deprive the State, *in the absence of congressional action* of the right of regulating the use of the *navigable waters* within the harbor lines thus established.

This authority, therefore, so far from sustaining the contention of the appellants, is an authority which directly supports the theory of the respondent.

Counsel for appellants, in their brief, page 3, under subdivision VI, submit the following proposition:

"Said section 12 did not exclude the jurisdiction of the State *inside* the harbor lines fixed by the Secretary in 1898."

One authority only is quoted in support of this proposition. It is Veazie *vs.* Moor, 14 Howard, 574. We will examine this authority and ascertain precisely what bearing, if any it has, in support of the above proposition. The facts as stated in the opinion of the court are as follows:

"The river Penobscot is situated entirely within the State of Maine, having its rise far in the interior of the State. It is not subject to the tides above the city of Bangor, near its mouth, and between the city of Bangor and Old Town, a distance of eight
235 miles, the Penobscot passes over a fall, is crossed by four dams erected for milling purposes, and for the above space is not at this time and never has been navigable.

On the thirtieth day of July, 1846, the legislature of Maine, by a law enacted that William Moor and Daniel Moor, Jr., their associates and assigns, were authorized to improve the navigation of the Penobscot river above Old Town, and for that purpose were authorized to deepen the channel of the river, to cut down and remove any gravel or ledge, trees, rocks or other obstructions in the bed thereof; to erect in the bed, on the shore or bank of said river suitable dams and locks, with booms, piers, abutments, breakwaters and other erections to protect the same; to build upon the shore or bank of said river any canal or canals to connect the navigable parts of said river, or, in case it shall be deemed the preferable mode of improvement, by railroads for the like purpose.

The fourth section of the act provided that if the said William Moor and Daniel Moor, Jr., their associates and assigns, should perform the conditions of the grant as contained in the preceding section, the sole right of navigating said river by boats propelled by steam from said Old Town so far up as they shall render the same navigable, is granted to them for the term of twenty years from and after the completion of the improvement."

The question involved was whether this act of the legis-
236 lature of the State of Maine was a *regulation of commerce*, within the meaning of that provision of the Constitution of the United States. The court held, according to the syllabus of the case, as follows:

"A State law granting to an individual the exclusive right to navigate the upper waters of the Penobscot river, lying wholly within the limits of the State, and separated from tide water by falls, and impassable for the purposes of navigation, and not forming a part of any continuous track of commerce between two or more States or with a foreign country, is not repugnant to the Constitution or any law of the United States."

By what process of reasoning the able and learned counsel for appellants can make any application whatever of this authority in support of the above proposition, is something, we confess, we are unable to understand.

Counsel at pages 20–21 of their brief, say:

"But it is argued that the City of Portland has no right to establish harbor lines where such lines have been established by the Secretary of War. Admitting for the sake of the argument that the State has no such right *eo nomine* that is not the question in this case. *Harbor* lines and *wharf* lines are not necessarily identical."

This statement proceeds on the assumption that although the Secretary of War may have power to establish *harbor* lines in the exercise of the power conferred by the commercial clause of
237 the Constitution, that notwithstanding this, while the city has no right *eo nomine* to establish *harbor* lines it has the power to establish *wharf* lines. If the city has this power to establish a *wharf* line, notwithstanding the action of the Secretary of War in establishing *harbor* lines, then the city may locate that line either *on* the *harbor* line, *inside* the *harbor* line or *outside* of the *harbor* line.

Conceding for the present that the city has this power to fix a *wharf* line, notwithstanding the action of the Secretary establishing a *harbor* line, counsel for appellants must agree with us that whatever action the city takes in establishing a *wharf* line must be *reasonable*. It must be a line that will not inevitably destroy absolutely the rights of the riparian proprietor upon the one hand, or of those navigating ships in the harbor on the other. A *wharf* line, therefore, located eighty or one hundred feet towards the land, or inside of the *harbor* line established by the Secretary of War, would have the precise effect intimated above. It would create a lane eighty or one hundred feet between the ships and the wharf, and this fact is of itself conclusive, not only of the *unreasonableness* of such action, but also of the absolute lack of power in the city to establish any wharf line which in any manner conflicts with a *harbor* line established by the Secretary of War. The action of the city, therefore, in establishing such a line every one must see at a glance would be *unreasonable*. The ships can go no farther towards the land than the *harbor* line fixed by the Secretary of War, while the shipper cannot come nearer
238 the water with his produce than the *wharf* line fixed by the city. The result is the commerce of the city is destroyed by reason of the *unreasonable* and *destructive* action of the city in locating the *wharf* line at such a distance inside the *harbor*

line. This all, of course, upon the theory that the action of the Secretary of War in establishing a harbor line is constitutional. And this, if the court please, is precisely what appellants insist on doing—that is to say, the right to establish a *wharf line* eighty-five feet at one point, and running each way to a point, *inside* or land side of the harbor line established by the Secretary of War, and *outside* or river side of which wharves cannot be built, thus in the case at bar, leaving a gap of eighty-five feet between wharf and ship.

Counsel Invoke the Police Powers of the State.

XX.

Under subdivision V in Appellants' Brief, page 2, counsel say "To regulate the driving of piles, or the building of wharves within the harbor of Portland, is within the police powers of the city." And several authorities are cited. We will consider each of them.

The first is that of The City of Dubuque *vs.* Stone, 32 Iowa, 84.

In that case there was no question whatever of conflict be-
239 tween the Federal and State authority, as the General Government had never assumed jurisdiction, and the court simply held that where a city is authorized by its charter to establish and regulate the use of wharves, fix the rates of wharfage, and regulate the anchorage and mooring of boats and rafts, it possesses, and may by ordinance exercise, the incidental power of prohibiting any and all persons, including those owning lots abutting on the stream navigated, from using any place other than the wharf so established by the city authorities, without permission of the city and payment of the ordinary wharfage fee.

It is conceded in this case that if Congress had never taken jurisdiction to establish harbor lines in the city of Portland, that then the city could regulate the matter by city ordinance under the provisions contained in its charter.

A reference to the syllabus of the case of Gray *vs.* Frazier, 21 How., 187, cited by counsel for appellants at page 2 of their brief will show at a glance that the case has no possible bearing upon the questions involved. The syllabus is as follows:

"*In the absence of any act of Congress covering the same subject*, the ordinance of a city prescribing for her port at what wharf a vessel may lie, how long she may remain, where she may load or unload, where she may anchor and for what time, and what description of lights she shall display, are valid, *if they do not conflict with the general admiralty law.*"

240 Thus, it will be seen that these local ordinances in order to be valid, must in the first place *not conflict with any act of Congress upon the same subject*, and secondly, they must *not conflict with the general admiralty law.*

The next authority cited is that of Vanderbilt *vs.* Adams, treasurer of the Hospital of the City of New York, 7 Cowen, 348.

In that case the court held that a statute of the State of New York, authorizing harbor masters to regulate and station vessels in

the East and North rivers in the city of New York, and imposing a penalty for disobeying their orders or the orders of either, extends to wharves in the hands of private owners, and is not unconstitutional as interfering with private property, or impairing the obligation of contracts.

There was no question involved to the effect that the statute was in conflict with any act of Congress upon the subject of regulating commerce.

Again, the case of Hunt *vs.* Mayor (it should be Hart *vs.* Mayor), 9 Wendell, 570, is cited by counsel.

Here, again, the question involved is entirely different from any question in the case at bar. The controversy being as to the right of an individual, without a grant, to construct and moor a floating storehouse or vessel, for the receiving and delivering out of goods and merchandise, in any bay, river, or in any port or harbor,
241 or any basin or docks thereof, and as to whether in such a case an injunction would lie at the instance of the corporation for the purpose of abating a public nuisance.

Counsel cite the celebrated license cases, 5 Howard, 574. It is difficult to perceive the precise application which counsel would make of these cases, or of the principles involved in them, or the decision of the court, to the case at bar. The questions decided in those were *were* simply these:

In the two cases of Massachusetts and Rhode Island, the court, Chief Justice Taney, following the decision in the case of Brown *vs.* The State of Maryland, 12 Wheaton, 419, held that where the act of Congress authorized a certain liquor to be imported into this country, that no State had a right to levy a tax on such liquor, or to require a license for the selling of such liquor, so long as the same remains *in bulk in the package unbroken* in which it was imported, or until such package *had been sold by the importer to a third party*, for the reason that the same up to such time was an article of *foreign commerce*, and therefore subject alone to the jurisdiction of Congress. But when the cask or package in which the imported article came into this country was *broken for sale in piecemeal*, or when the package was *transferred to a third party*, that then in either of such cases, the article imported ceased to be an article of foreign com-
242 merce, the power of Congress over the same ceased, and the same was then subject to the State tax or license fee authorizing its sale.

While in the third case it was held that a law of New Hampshire, the effect of which was to prevent the sale, without a license, of a barrel of gin, purchased by the defendant in Massachusetts, and by him imported into New Hampshire, was not repugnant to the Constitution or laws of the United States, for the reason that although when the barrel of gin left the port in Massachusetts, having been purchased there by the defendant and forwarded by him to New Hampshire, it ceased to be an article of *foreign commerce* and became an article of *interstate commerce*, but as Congress had passed no law on the subject relating to *interstate commerce*, therefore the State of New Hampshire had the right to exact a license fee before the de-

fendant could sell his gin. The opinion of the court in that c concludes as follows:

"Upon the whole, therefore, the law of New Hampshire is, in judgment, a valid one, for although the gin sold was an import fr another State and Congress have clearly the power to regulate su imports under the grant of power to regulate commerce *among several States;* yet *as Congress has made no regulation on the subj* the traffic in the article may be *lawfully regulated by the State* soon as it is landed in its territory, and a tax imposed upon it, o license required, or the sale altogether prohibited, according to policy which the State may suppose to be its interest or duty to pose."

243 This decision, therefore, is in direct line with our cont tion, that in many instances the State may enact laws re lating commerce, either foreign or interstate, where Congress not legislated on the subject.

The case of the City of New York *vs.* Milne, 11 Peters, 132, 1 cited by counsel, presents an entirely different question from t now before the court. The question in that case was simply whet an act of the legislature of the State of New York, which inflict penalty upon the master of a vessel arriving from a foreign p who neglects to report to the mayor or recorder an account of passengers, was or was not a regulation of commerce, but simply police, and therefore not in conflict with the Constitution of United States. A majority of the court held that it was not a re lation or commerce, and therefore the act was valid, although Justice Story delivered a very able and elaborate dissenting opini in which he held that it was a regulation of commerce. But ev conceding that it was a regulation of commerce, it was not in c flict with any act of Congress on the subject, as held by a majo of a court, and for that reason was not unconstitutional.

Again, counsel quote in their brief, page 2, the case of Cooley The Board of Wardens of the Port of Philadelphia, 12 Howard, 2 (erroneously cited in brief as 12 Wheaton), to support th

244 proposition that the driving of piles, and the building wharves within the harbor of Portland, is within the pol powers of the city.

This is the leading case in which the question was determined the first time by the Supreme Court of the United States, that States respectively had the power to pass laws regulating pil But upon what was this decision based, and why is it that today several States have power to pass laws regulating pilots on navi ble waters? Simply this: Of course, prior to the adoption of Federal Constitution, the power to regulate commerce among States and with foreign nations rested with the States respective After the adoption of the Constitution, however, the Congress, August 7, 1789, by section 4 (5th Statutes at Large, 153) provid as follows:

"That all pilots in the bays, inlets, rivers and harbors and po of the United States, shall continue to be regulated in conform with the *existing laws of the States* respectively wherein such wat

may be, or with *such laws as the States may respectively hereafter enact for the purpose*, until further legislative provision shall be made by Congress."

It was, therefore, in pursuance of this congressional action that the Supreme Court of the United States held in the case *supra*—first holding, however, that the regulation of pilots on the navigable waters of the United States was a *regulation of commerce within the commercial clause of the Constitution of the United States*—
245 that Congress by the act of 1789, *supra*, had recognized, not only the then existing laws of the several States upon the subject of pilotage, but also the right upon the part of the several States to legislate upon that subject in the future. This is the whole of that case. What bearing, we would respectfully inquire of the court, can the decision in that case possibly have upon the one at bar? With all due respect to the able counsel of the other side, it certainly can have none whatever. But, as has been said of several of the other authorities quoted by counsel, the decision taken as a whole is a direct recognition of the theory urged by us in this case.

In the case of Crandall *vs.* Nevada, 6 Wallace, 35, cited by counsel, the court held that a special tax on railroad and stage companies for every passenger carried out of the State by them, is a tax on the passengers for the privilege of passing through the State by the ordinary modes of travel, and is not a simple tax on the business of the companies, and that the existence of such a power to tax in the States is inconsistent with the objects for which the Federal Government was established, and with the rights conferred by the Constitution on that Government, and on the people, and that the exercise of such a power is accordingly void. The case so far from supporting the theory of appellants is just the reverse.

The case of Munn *vs.* Illinois, 94 U. S., 114, next cited in appellants' brief, is what is known as the elevator warehouse cases.
246 And the syllabus of the case indicates clearly that the law of the State was held to be valid for the reason that there was no act of Congress upon the subject with which it came in conflict. The syllabus reads as follows:

"Where warehouses are situated and their business is carried on exclusively within a State, she may as a matter of domestic concern prescribe regulations for them, notwithstanding they are used as instruments by those engaged in interstate as well as in State commerce, *and until Congress acts in reference to their interstate relations*, such regulations can be enforced, even though they may *indirectly* operate upon commerce beyond her immediate jurisdiction."

The case of Thorpe *vs.* Rutland and Burlington R. R. Co., 27 Vermont, 149, is next cited.

The questions involved in that case were those relating solely to the power of the legislature of the State of Vermont to alter or repeal charters of private corporations, and to pass laws requiring such corporations to maintain cattle guards at all crossings, or to respond in damages for all cattle injured by their trains through such omission.

It is conceded by us that this power exists in every State, and is known and recognized as the police power of the State. That is the power upon the part of the State to legislate for the protection of the public health, the public morals and the *public safety.*

247 The next case cited by counsel in support of this proposition is that of Boston & M. R. Co. *vs.* The County of York, 79 Maine, 386.

The question decided in that case was simply this: That railroad companies may constitutionally be required by the county commissioners of the county of York to build and maintain highway crossings, under the Revised Statutes of the State of Maine, although such liability is imposed by a statute enacted subsequent to the chartering of such companies, and although their charters provide that they are not subject to "amendment, alteration or repeal." This the court held could be done under the police power of the State, and for the purpose of protecting the *lives, limbs and property of the county.*

No question of conflict between the Federal and State law figured in that case, nor was there any principle involved that could be with propriety made applicable to any feature of the case now before the court.

Respondent Montgomery has the right to construct his wharf as far beyond the line of low-water mark as he is constructing it by virtue of the grant in the act of 1862. (Hill's Code, section 2447.)

XXI.

We concede, as has already been said, that in the absence
248 of any act of Congress taking jurisdiction of the question of establishing harbor lines in this city, the State could establish such lines, and the State of Oregon did, by the act of October 17, 1862, second volume, Hill's Annotated Laws of Oregon, sections 4227, 4228, take jurisdiction in the matter.

By the first of these sections, it will be seen the owner of any land in the State of Oregon, lying upon any navigable stream within the corporate limits of any town, is authorized to construct a wharf or wharves upon the same, *and extend such wharf or wharves into such stream beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ship or other boats or vessels that may or can navigate such stream.*

Here is a *positive grant* upon the part of the State of a right upon the part of the riparian owner *to extend his wharf beyond low-water mark so as to connect with vessels of all sizes navigating such river.* There is nothing in the act of Congress authorizing the Secretary of War to establish harbor lines, that in any manner conflicts with this section of the statute. Therefore, it stands today in full force, in harmony with the act of Congress of September 19, 1890.

The next section, however, of this State law (4228) confers power upon the city to prescribe the mode of exercising this privilege and the *line of low water-mark.* This section, therefore, is in direct con-

flict with the seventh and twelfth sections of the act of Con-
249 gress of September 19, 1890, and must, therefore, give way to the congressional enactment.

But suppose it should be held there is no conflict. Then it is confidently submitted the city has not by this section any right or power to *fix an arbitrary line beyond which such wharf shall not be built.* The only line the city is authorized to establish is the one fixed by section 4227, *supra*, and is a line *beyond low water-mark* so far as may be necessary and convenient for the "*use and accommodation of ships navigating the harbor.*" The question as to what is "*necessary and convenient*" for the *use and accommodation of ships*, is a question of *fact*, and the mere declaration of a municipality cannot determine the matter. All the city can do, provided it has any power left under section 4228, *supra*, is to fix a "*line of low-water mark.*"

Hill's Code, sec. 4227.
Hill's Code, sec. 4228.
Yates *vs.* Milwaukee, 10 Wall., 504.

The act of 1862, section 4227, Hill's Annotated Laws of Oregon, grants to the respondent Montgomery as the owner of land lying on the Willamette river, the right to construct his wharf upon said lots lying within the city of Portland, and the further right "*to extend the same into such stream beyond low water-mark so far as may be necessary and convenient for the use and accommodation of any*
250 *ships or other boats or vessels that may or can navigate such stream.*"

The evidence in this case (see different measurements of depths of water marked on map "Exhibit A" part of answer) shows that the depth of water on the harbor line as re-established September 23, 1898, averages at low water less than eight feet.

It appears, therefore, *affirmatively* by, and it is absolutely clear from the record in this case, that the respondent has in virtue of the section of the act of 1862, *supra*, the right to extend his wharf at least to this line, that is, the harbor line re-established by the Secretary of War September 23, 1898; and even if under the circumstances of this case the following section of said act, 4228, giving the city the right to "regulate the exercise of the franchise granted" by section 4227, can be construed as still having life, which we deny, there is no suggestion or averment in the bill of complaint that the respondent is either extending his wharf beyond the line authorized by section 4227, or that he is constructing the same in the absence of any regulation by the city.

Inasmuch, therefore, as the respondent has the right by *direct and positive grant from the State* (act of 1862, section 4227, Hill's Code) to extend his wharf beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ship or vessel that may or can navigate said river, the city has no power,
251 whatever, either by virtue of section 4228, Hill's Code, or of the provisions of the present city charter, to fix a line at any place beyond which such wharf shall not be extended, short of a line

"*necessary and convenient for the use and accommodation of the l ships that may or can navigate such river*," and the record in this clearly shows affirmatively that in order to accommodate such s such wharf must be extended at least as far beyond low-water m as the location of the harbor line established by the Secretary of in September, 1898.

It is submitted there is no power conferred upon the city by se 4228, Hill's Code, to establish any line outside of which respond wharf should not be constructed. The only line the city is au ized to prescribe by that section conceding for the argument th tion to be still operative, is the "*line of low-water mark;*" but b *express terms* of section 4227 the respondent has the right to ex his wharf "*beyond* low-water mark," and not only beyond low-w mark, but beyond it "*so far as may be necessary and convenient f use and accommodation of any ship or other boats or vessels that m can navigate such stream or other like water.*"

Common-law Rights of Riparian Owners.

XXII.

The riparian owner, in the absence of restrictive legisla
252 has the right in his own interest, as well as in the intere the public, to connect his shore line by means of wha piers or docks, constructed in the shoal or shallow waters imm ately bordering upon his land, *with the waters which are navigab fact.*

Railroad Company *vs.* Schurmeier, 7 Wall., 272.
Yates *vs.* Milwaukee, 10 Wall., 297.
Weaver *vs.* Harbor Commissioners, 18 Wall., 57.
Dutton *vs.* Strong, 1 Black., 23.
Lewis *vs.* City of Portland, 25th Oregon, 133.

In Yates *vs.* Milwaukee, 10 Wall., 498, *supra*, Mr. Justice Mi in delivering the opinion of the court, said:

"It does not seem to be necessary to decide whether the tit the lot extends to the thread or channel of the river, though it soil was originally part of the public lands of the United State seems probable, the case of The Railroad Company *vs.* Schurm 7 Wall., 272, would limit the title to the margin of the str But whether the title of the owner of such a lot extends beyond dry land or not, he is certainly entitled to the rights of a ripa proprietor whose land is bounded by a navigable stream;
253 *among these rights are access to the navigable part of the from the front of his lot*, the right to make a landing, wha pier for his own use or for the use of the public, subject to s general rules and regulations as the legislature may see prope impose for the protection of the rights of the public whatever t may be. This proposition has been decided by this court in case of Dutton *vs.* Strong, 1 Black, 25, and The Railroad Comp *vs.* Schurmeier, just cited. The supreme court of Wisconsin gone further and asserts that the doctrine that the *title* of the ow

of such lot extends to the center of the stream, subject to the easement of the public in its use for navigation, and that he 'may construct docks or landing places for goods or passengers, taking care that vessels employed in navigating the stream are not impeded in their passage, nor prevented from the use of all parts of the stream which are navigable.' Walker *vs.* Shepardson, 4 Wisconsin, 486.

"The riparian right *is property*, and *is valuable*, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

14 amendment Const. U. S.
Yates *vs.* Milwaukee, 10 Wall., 498.
Lewis *vs.* City of Portland, 25th Oregon, 133.
254 City of Janesville *vs.* Carpenter, 77 Wis., 288.
Rumsey *vs.* N. Y. & New Eng. R'y Co., 133 New York, 79.

In The Railroad Co. *vs.* Schurmeier, 7 Wall., *supra*, the court held: "Viewed in the light of these considerations, the court does not hesitate to decide that Congress, in making the distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways. Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves for the convenience of commerce and navigation as accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide."

This authority, Yates *vs.* Milwaukee, *supra*, is directly in point on the following propositions involved in the case at bar.

The owner of land bounded by a navigable river has certain riparian rights, whether his title extends to the middle of the stream or not.

255 Among these are, *free access to the navigable part of the stream*, and the right *to make a landing, wharf or pier for his own use, or for the use of the public.*

These rights are valuable and are *property* and can be taken for the public use only when *due compensation is made.*

They are to be enjoyed, subject to such general rules and laws as the legislature may prescribe for the protection of the public right *in the river* as a navigablr stream.

The decisions of the supreme court of Oregon fully sustain our contention.

But the principles for which we are contending as to the right of respondent as a riparian owner, to construct and extend his wharf as far beyond low-water mark as may be necessary and convenient for the use and accommodation of ships, has been fully recognized

and definitely settled by this court in several cases; notably in Parker *vs.* Taylor, 7 Oregon, 446; Parker *vs.* Rogers, 8 Oregon, 190; Andrews *vs.* Knott, 10 Oregon, 501; Bowlby *vs.* Shively, 22 Oregon, 410; and Lewis *vs.* City of Portland, 25 Oregon, 133.

In these cases every phase of the law relating to the ownership in tide lands, shore lands and lands under tide waters; also of
256 lands under navigable and non-navigable waters, in which the tide does not ebb and flow; and the riparian rights respectively of those owning lands on these several kinds of waters, has been exhaustively and ably discussed by this honorable court. And what have been the conclusions, as finally summarized in the latest case—that of Lewis *vs.* City of Portland, 25 Oregon, *supra*—in so far as they bear upon, and have application to, the case now before the court?

They are as follows: *First*—This court gave recognition to the custom which has prevailed from the early settlement of the country in respect to the building of wharves by riparian owners, out to the navigable waters; this, upon the principle, *consuetudo pro lege servatur*, and also held, that the legislation of the State upon the subject justified the conclusion that the State had, in such legislation, also recognized such custom, and affirmatively approved it; and hence it was held in the case of Lewis *vs.* City of Portland, *supra*, (1) That riparian proprietors, on the navigable rivers of this State, who have built wharves out to navigable waters in front of their upland, have rights of property therein which cannot be taken for public use, except after due compensation first paid. (2) The object of sections 4227, Hill's Code, which authorizes the owners of land on navigable streams, and within the limits of incorporated cities, to construct wharves thereon, and extend them out to navigable waters so far as convenient and necessary for the use
257 and accommodation of ships, being to encourage the building of wharves in aid of navigation and commerce, therefore, riparian owners on navigable streams within the limits of an incorporated city, who, before the passage of such section, had built wharves on such upland, and extended them out to navigable water, acquired within the spirit and intent of said section, *property in such wharves*, which cannot be taken for public use without just compensation; and *further*, that the riparian owner in such case acquired a *vested right* in such *wharf property* that cannot be taken for public use without just compensation. While it is true the wharf in controversy in the case of Lewis *vs.* City of Portland, *supra*, had been constructed *prior* to the enactment of section 4227, *supra*, yet it is very manifest that no *vested right*, or *property right*, could be acquired, which could not be taken for public use without compensation, unless there was an *inceptive primary right*, as against the State, to construct and extend the wharf to navigable water. No vested right in property can be acquired by a trespasser. No property rights that cannot be taken for public use without compensation can be acquired by one who, without right or authority enters upon the public domain. The ownership of land below high-water mark on the Willamette river was, originally, under the de-

cisions of this court, vested in the State. If then the State has not, either by positive legislation, or otherwise, as by no *negative* legislation and by *acquiescence*, relinquished to riparian pro-
258 prietors the right to extend their wharves, then such, proprietors cannot by mere appropriation, acquire any vested right therein.

But not only so, all the reasoning, and the entire opinion of Chief Justice Lord in that case, are to the effect, that in the *then* state of legislation on the subject, the owner of lands lying on the Willamette river, within the limits of an incorporated city had a right to extend their wharves beyond low-water mark, so far as necessary and convenient for the use and accommodation of ships or other vessels navigating such. We respectfully submit, therefore, the decision in Lewis *vs.* City of Portland is an authority directly in point as to the right of respondent, in so far as the State can confer such right, to extend his wharf, so far beyond low-water mark as may be necessary and convenient for the use and accommodation of ships navigating said harbor, and the State is estopped from making denial of such right. In the case of Lewis *vs.* City of Portland, *supra*, the same counsel represented Lewis, the wharf owner, that now represent the appellants herein. If not treading on unprofessional ground, and we only desire to be complimentary, we would respectfully attract the attention of the court to their very able and instructive brief in that case, in favor of the rights of riparian proprietors, on pages 147–149, 25 Oregon.

It is clear that in virtue of section 4227, Hill's Code, either *granting irrevocably, or licensing* the riparian proprietor, to extend his wharf beyond the line of low-water mark, so far as necessary
259 and convenient for the use and accommodation of vessels navigating the Portland harbor, and of the proviso in the act of 1876, (Session Laws, 1876, p. 70), which provides: "That the Willamette, Coquille, and Coos rivers shall not be deemed rivers in which the tide ebbs and flows within the meaning of this act. * * * And that the title of this State to any tide, and overflowed lands upon said rivers *is hereby granted* and *confirmed* to such *owner of the adjacent lands*," and in view of the further fact that there is no *restrictive* legislation, it is perfectly clear that the right of respondent to extend his wharf to *deep water*, cannot be questioned by the State, or by any municipality representing the State.

We have insisted elsewhere in this argument that said section 4227, Hill's Code, act of 1862, was a *grant*, and something more than a *mere license*. Such also it seems was the opinion of counsel for appellants when representing Lewis, the wharf owner, in the case 25 Oregon, *supra*. We quote the following from their brief in the case, page 148:

"It was suggested that the act of 1862 (section 4227, Hill's Code) was only a license, and revocable. We think it grants something more than an ordinary license; but if it be simply a license, then it has been executed, and a court of equity will not allow a licensor to revoke an executed license without compensation to the licensee. (Washburn on Easements, 3 ed., page 680.)"

260 So say we; but conceding for the argument that section 4227, Hill's Code, is not, as we claim, and as counsel for appellants claimed in the Lewis case, *a grant*, but simply *a license* revokable at the pleasure of the legislature, until acted upon or availed of, it has not as a matter of fact ever been revoked by the legislature, but still is in full force and effect. And the record in this case (bill of complaint, Abstract of Record, 1–9) shows that the rights conferred by this section had, at the commencement of this suit, been accepted, and was being *exercised by the respondent* by the construction of his wharf, and hence, having been thus acted upon and availed of, the power of the legislature to revoke it is forever gone.

Bowlby *vs.* Shively, 22 Oregon, 420.
Washburn on Easements (3rd ed.), p. 680.
Brief of George H. Williams, C. E. S. Wood, S. B. Linthicum and J. Couch Flanders, counsel for Lewis, 25 Oregon, 144–149.

In considering, furthermore, the nature and extent of the rights of riparian proprietors on the *the* navigable waters of the Willamette river, the act of the Oregon legislature, approved October 26, 1874, as amended by act approved October 21, 1876 (Sess. Laws 1876, p. 70), must not be overlooked. By that act the State *granted* and *confirmed* to all the owners of lands adjacent to the waters of
261 the Willamette, Coos and Umpqua rivers, all the title which the State then had to all *tide* and *overflowed* lands upon said rivers. The act says that these three rivers "shall not be deemed rivers in which the tide ebbs and flows within the meaning of this act," and this court, in Andrus *vs.* Knott, 12 Oregon, 501, held there were no *tide lands* within the meaning of this act on the Willamette river at the city of Portland. It will be observed, however, the act grants to riparian proprietors not only all *tide* lands but all *overflowed* lands. This court, in Andrus *vs.* Knott, did not pass upon the question as to what constitute *overflowed* lands within the meaning of the act of 1876, or whether there are or are not *any such lands* within the limits of the city of Portland "*adjacent*"—that is the term used in the statutory grant—to the Willamette river. The claim of plaintiff in case Andrus *vs.* Knott, was that the lands in controversy were *tide* lands, not *overflowed* lands. The question, therefore, as to what constitutes "*overflowed*" lands within the meaning of said act is, it is submitted, an open one. That the use of these two designations, "*tide*" and "*overflowed*," by the legislature was not intended as descriptive of but *one* class of lands, that is lands "tide *and* overflowed," but was intended to designate *two* kinds of lands wholly different from each other; the one covered by the *tides*, the other by *overflow*, is perfectly plain. What constitutes *tide lands* is correctly described by this court in Andrus *vs.* Knott, 12 Oregon, 521, as lands "*covered and uncovered by the ordinary*
262 *tides*." In other words "lands which are adjacent to navigable waters, and where the tide flows and reflows, and which at *high tides are submerged and at low tides are bare*."

What, then, are the *overflowed* lands granted by the act? We submit they are those lands adjacent to the river which lie between ordinary high and ordinary low-water mark. It is manifest this was the character and description of land intended to be covered by the term "*overflowed lands.*" The act had no reference to lands away from the river. They must be overflowed lands, and lands *adjacent* to the navigable waters of the river, and, as it must be presumed the State intended to grant something, and as that is the only *something* that can be covered by the act, it seems to us that those were the lands to which the grant attaches. We quite agree, therefore, with counsel for appellants in the statement contained in their brief in the case of Lewis *vs.* City of Portland, 25 Oregon, 146, in which they say:

"If the land upon which the plaintiff's wharf stands between high and low-water mark is tide land, then it is expressly *granted* and *confirmed* to the plaintiffs (respondent) by section 1 of the act of October 21, 1876, Laws of 1876, page 70, and becomes *absolutely their property.*" And we may say still further that if the land upon which the respondent is building his wharf is *overflowed* land within the meaning of that act, then also the same is *expressly granted* to him by said act. And this view is also supported by the
263 following statement in counsel's brief, case Lewis *vs.* City of Portland. They say:

"Assuming then, that under the acts of our legislature and the decisions of the supreme court, the Willamette river at Portland is a river in which the tide does *not* ebb and flow within the ordinary meaning of those terms, we refer to the following cases holding that the riparian proprietor has a right to build a wharf extending into the river for his own use, and for the use of the public, and as far as the necessities of navigation may require: Yates *vs.* Milwaukee, 77 U. S., 10 Wall, 497; The Illinois Central Railroad Co. *vs.* Illinois, 146 U. S., 387. (This, by the way, is the same case now quoted by appellants' counsel against us.) Parker *vs.* West Coast Packing Co., 17 Or., 515; Gould on Waters, sec. 179."

Counsel's Brief, case Lewis *vs.* City of Portland, 25–'6 Oregon, 133.

Quarantine Laws.

XXIII.

Counsel in their brief seek to draw an argument from the quarantine laws. (Appellants' Brief, 16.)

Quarantine laws are necessarily laws for the protection of the public health. Their enactment, therefore, is clearly an ex-
264 ercise of the police power, but it is a police power attaching to the Federal Government as well as the State government. Each may enact quarantine laws, and each, so long as they do not conflict, may be enforced. But if a conflict arises, then the law enacted by the State, *although an exercise of the police power*, must give way to the law enacted by the National Government.

The Supreme Court of the United States in Morgan *vs.* Louisiana, 118 U. S., 464, speaking by Mr. Justice Miller, said:

"But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, *the State laws on the subject will be abrogated, at least so far as the two are inconsistent*, but until this is done the laws of the States on the subject are valid. * * * Quarantine laws belong to that class of State legislation, which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid *until displaced or contravened by some legislation of Congress.*"

Morgan *vs.* Louisiana, 118 U. S., 465.

Counsel for appellants in their brief, page 16, say:

"The jurisdiction of the State and General Government
265 *are* concurrent. There is nothing extraordinary about this. They are concurrent as to pilotage, inspection, quarantine and other similar laws for the protection of ships, shippers and sailors."

Counsel, however, neglected in this statement of the law, as applicable to this suit, to state a vital and most important proviso, or qualification, to the effect, especially in the case of quarantine laws, that the laws, rules and regulations of the National and State governments, respectively, are only concurrent, and can only be enforced respectively, *when they do not conflict.* When they do conflict then those of the State fall into "*innocuous desuetude*" and are abrogated. As to laws regulating pilots, we have already shown that Congress at its first session in 1789 relinquished its right to the several States.

The Supreme Court of the United States, speaking further of quarantine laws, in Morgan *vs.* Louisiana, 118 U. S., 464, says:

"While it may be a police power in the sense that all provisions for the health, comfort and security of citizens are police regulations, and an exercise of the police power, it has been said more than once in this court, that even where such powers are so exercised as to come within the domain of Federal authority, as defined by the Constitution, *the latter must prevail.*"

Gibbons *vs.* Ogden, 9 Wheat., 1–210.

Henderson *vs.* The Mayor, 92 U. S., 259–272.

New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650-661.

266 *A Recent San Francisco Case.*

We take the following extract from a late issue of the San Francisco Chronicle, relating to a case involving the same principle involved in the one at bar, namely, the supremacy of the Federal law in a case of conflict between that and the State authorities upon the subject of quarantine in a public port. We have not been able to get the decision in the case:

"Federal law is supreme. Local quarantine officer is shorn of authority. In the case appealed from the police court, Superior Judges Cook, Dunne and Lawler decided yesterday that the quarantine regulations of the Federal Government at this port take precedence over regulations of the local board of health. The authority of Dr. M. J. Rosenau, the Federal quarantine officer, was sustained as against the authority of Dr. Chalmers, quarantine officer of the board of health. The question was raised by the landing of the steamer *Gaelic* in September, 1897, under the authority of Dr. Rosenau and in violation of the order of Dr. Chambers. The *Gaelic* entered this port from China and was boarded by both quarantine officers. Dr. Rosenau issued a permit for the vessel to dock. Dr. Chambers appeared later and commanded the pilot in charge to stop the vessel. Jordan, acting under orders from Captain Finch, ignored Dr. Chambers, and the vessel docked under the permit of Dr. Rosenau. Captain Finch and Pilot Jordan were both
267 arrested for violating the local health ordinance. In the police court both were convicted. The superior judges on appeal have now reversed the judgment of the police court and ordered the case dismissed. The appellate court held that the appointment of Dr. Rosenau, under a proclamation of President McKinley, was valid and gave the *Federal appointee paramount authority.*"

We readily concede, were it not for the conflict with the action of the Federal Government, that in case it were necessary *as a matter of fact*, in order to preserve and protect the Portland harbor in the interest of commerce and navigation, that the Port of Portland could widen the harbor by cutting a channel twenty-five feet deep, for such width as might be *reasonably necessary*, even if such cut extended to the center of respondent's lots, taking 10, 20, 50 or even 100 feet of the dry land, but in such a case to do so the board of commissioners of the port of Portland must proceed in the proper way, that is, by bringing into exercise the power of *eminent domain*, condemning the property thus needed for this public use, and by *making compensation* therefor. In such proceeding the right of trial by jury would be preserved to the respondent, and such jury under direction of the court would be called upon to decide *two* questions: *First*, is the use for which the property is required a *public* one, and, *second*, what is the amount of compensation the Port of Portland must pay for the property needed for such purposes?

268 As the matter stands now the respondent has by direct grant from the State, as we have already shown (Hill's Code, sec. 4227) the right to extend his wharf beyond the line of low-water mark so far as necessary and convenient for the use and accommodation of the largest ships coming to the harbor. This is a *property right*. It is a right Mr. Montgomery cannot be deprived of *without just compensation*. He cannot be deprived of it *without due process of law*. Therefore, a court of equity has no jurisdiction or power to deprive him of it, or to restrain him from exercising it until the board of commissioners of the port of Portland at some ndefinite time in the future—"*in the near future*" the resolutions of

the board say (Abstract of Record, 6)—get ready to widen
channel.

14 amended Const. U. S.
Yates *vs.* Milwaukee, 10 Wall., 498.
And authorities, *supra.*
Art. I, sec. 18 Const. of Oregon.

The learned counsel for appellants, it must be presumed for w
of something better in the way of argument, enter the realm
philology. On pages 26 and 27 of their brief they say:

"Harbor lines and wharf lines are, or may be entirely disti
Etymologically a harbor is a place for ships where they may r
at anchor. A wharf is a landing place for cargoes."

269 Most assuredly a wharf "*is a landing place for cargo*
What is a cargo? The lexicographer says it is the "lad
or freight of a ship; the goods, merchandise, or whatever is c
veyed in a ship; load, freight."

And consulting Webster further we find a "*wharf*" defined
follows:

"A perpendicular bank of ground, or timber, or stone and ear
raised on the shore of a harbor, river, canal or the like, and exte
ing some distance into the water, *for the convenience of loading*
unloading ships and other vessels."

While Bancroft, says: "Commerce pushes its *wharves into the s*
And if we may be permitted for a moment to drop into poetry
might quote from Tennyson:

"Out upon the *wharves* they came,
Knight and burgher, lord and dame."

Taking then these different definitions of *harbor* and *wharf*,
spectively, does it not follow that the wharf and the naviga
waters of the harbor must be brought together? The ship must
able to go to the wharf, otherwise the *cargo*, the goods, wares and m
chandise on the ship could not be unloaded on the wharf. But
learned friends, the counsel for appellants, contend that, althou
Congress may, through the Secretary of War establish a *harbor* li
beyond which, shoreward, ships may not go, yet the State or c
may establish a *wharf* line at any place *inside* such harb
270 line ten, twenty, yes, eighty-five feet distant, as is claimed
this case, from such harbor line, and beyond which towa
the harbor wharves shall not be extended, thus, as we repeat, le
ing a gap, or lane, eighty-five feet in width between the ship and
wharf. Such is the glaring absurdity to which the theory of coun
for appellants inevitably leads. Such is the argument advanced
sustain the jurisdiction and action of the State against those of
Federal Government.

We cite this as a fair sample of the arguments which the able a
learned counsel for appellants are compelled to resort to by
necessities of this case. *Ex uno disce omnes; ex pede Herculem.*
this instance, however, the foot disclosed is that of a dwarf rat
than that of a Hercules.

Counsel for appellants in their brief, page 28, say:

"This court may take judicial notice, because it is a part of the public history of the State that this Port of Portland has expended more than $600,000 *dollars* in the improvement of the Willamette and Columbia rivers."

We might reply to this by saying, that this court may take judicial notice, because it is a part of the public history of the State, and also of the operations of the board of commissioners of the port of Portland, *and a fact as well*, that whatever may have been
271 spent elsewhere in the Willamette and Columbia rivers, not a cent, aside from about $2,000 paid a dredger, have they in all the eight years of its existence, expended within the limits of the city of Portland in either harbor or river, in either deepening, widening, or otherwse improving the channel or harbor.

Conceding the right of the Port of Portland to make any decision affecting the respondent, such decision is neither conclusive nor binding.

XXIV.

Counsel for appellants insist that "the decision of the Port of Portland is binding upon respondent." And in support of this somewhat startling proposition we are cited to the following authorities and these only:

Am. & E. Ency. of Law, page 1046 and cases cited.
Dillon on Municipal Corporations, secs. 832, 836.

In this connection let us examine and ascertain what it is *precisely* that the board of commissioners of the port of Portland have *decided*, and which *decisions*, according to appellants' contention,
272 are *conclusive* against the respondent Montgomery and everybody else. They decided November 2, 1898.

1. That the wharf line established prior to July, 1898, by the United States engineers, curtails the navigable waters of the Willamette river at the city of Portland to the full extent, which may be done in the interest of the shipping interests of the port.

2. That in order to provide sufficient space and width of channel to accommodate the shipping interests of the port, it will be necessary *in the near future*, to so improve the channel of said river from the steel bridge to the south end of Swan island, by making it twenty-five feet deep its full width, between the wharf lines established by the United States engineers prior to July, 1898.

3. That to allow any wharves to be extended into said Willamette river within the limits of the city of Portland, beyond the wharf lines so established, *supra*, will be to create a lasting damage to this port and the shipping interests thereof.

Now, how do these three *decisions*, taken together, affect the property and interests of the respondent Montgomery? The "*wharf line*" as counsel for appellants, and also the board of commissioners of the port of Portland in their resolutions call it, established by the "*United States engineers*," as also stated by them, was located along and in front of the respondent's property where the water

was and still is at no point two feet in depth, and the av
273 age depth of which was and is not one foot. The depth
actual measurement (see map attached to answer, marl
"Exhibit A," Abstract 35), on the line established by the Secret
of War September 23, 1898, at the remotest distance—about eigh
five feet—from the line established by him August 9, 1892, and
greatest depth, is not quite thirteen feet deep, and the average de
of water along said line established in 1898, in front of the respo
ent's property, is not quite eight feet (see map attached to answ
"Exhibit A.") (Abstract, 35 and 39.)

Now, it is an historical fact known to all, this court includ
that many ships come to Portland every month in the year dr
ing, when loaded, from twenty-two to twenty-three feet. A
further that the busiest shipping months in Portland, are th
when the water is lowest of the year. It is a further fact shown
the record in this case (seventh finding of fact, Abstract 40) that
distance opposite respondent's property, between the line establis
by the Secretary of War September 23, 1898, and that establis
by him on the other side of the river, August 9, 1892, is about
thousand feet, while the distance across the harbor nearly one m
above is only six hundred feet, and is spanned by a railroad bri
resting on piers.

In view, therefore, of these conceded facts, can it be said that
decisions, so called, of the board of commissioners of the port
Portland are *reasonable*, much less *true as a matter of fact*? a
274 if *unreasonable* or *untrue as a matter of fact*, then we sub
they are not binding on either Mr. Montgomery or any
else.

Counsel say (Brief, 30) it is a reasonable decision because it c
forms to the decision of the board of engineers in 1892, and also
the decision of Major Fisk, the United States engineer. Th
might be some force in this argument were it not for the stubb
fact that both of these decisions have been overruled and set as
because they were *unreasonable*, by both the Chief of Engineers
the United States Army and the acting Secretary of War.

If the Port of Portland has, in the interest of the harbor, the ri
to dig a channel twenty-five feet deep out to a line in front of
spondent's property where the water is less than one foot deep, th
for the same reason, they can go five, ten, fifteen or one hund
feet further landward on respondent's property. And in such c
will it be contended that Mr. Montgomery could be thus depri
of his property by the mere *ipse dixit* of the board of commission
of the port of Portland? Such a proceeding would be in plain
lation of the fourteenth amendment to the Constitution of the Uni
States which, among other things, provides:

"Nor shall any State deprive any person of life, liberty or pr
erty without due process of law."

It would be also in direct conflict with section 18, articl
275 of the constitution of the State of Oregon which, among ot
things, provides that "private property shall not be tak
for public use * * * without just compensation."

Neither the decisions of the City of Portland, nor the Port of Portland, are conclusive.

XXV.

Counsel for appellants, in their brief, page 30, say:

"The Port of Portland has decided that the construction of the wharf, as proposed by Mr. Montgomery, will shoal the navigable waters of the river and obstruct its work in making and widening a channel as required by its act of incorporation, and this *decision is conclusive upon him and upon all the citizens of Oregon.* It is a reasonable decision, because it conforms to the decision of the board of engineers in 1892, and also to the decision of Major Fisk, U. S. engineer in charge of said river, *and there is no appeal from it.* It has the same force and is as binding as an act of the legislature to the same effect."

This, it is respectfully submitted, is a most monstrous proposition. Neither the City of Portland, nor the State of Oregon, by a direct statute, could declare that the construction of the wharf, as proposed by Mr. Montgomery, will shoal the navigable waters of the
276 river and obstruct the work of the Port of Portland in making and widening a channel as required by its act of incorporation, which would be binding upon Mr. Montgomery and on the courts, or from which there could be no appeal.

"A law is a rule of action prescribed by the supreme power of a State, commanding what is right and prohibiting what is wrong."—Blackstone.

Such a declaration as the above in an ordinance or in a statute is not a *rule of action*, it is not a *law;* it is a *decision* by the legislature, a *decision* by the municipality, the effect of which is to deprive a man of his property *without due process of law.* Such a statute or such an ordinance is, as to the *facts* it undertakes to *decide*, open to review by the courts. The State or city might have enacted such a law undertaking to decide *certain facts* as to the effect of the construction of the wharf, and then might have attached a penalty to be imposed by the court on conviction, in case he proceeded to construct the wharf contrary to the decision of the ordinance, and in case of violation by Mr. Montgomery he could have been arrested for a violation of the law. Would it be contended by the learned counsel for appellants that in such case the *facts* decided by the ordinance were not open to review on evidence? Certainly not.

This decision by the Port of Portland, while we contend that they had no jurisdiction or power whatever to make any declaration upon the subject or to establish any wharf line, is, in so far
277 as it undertakes to decide facts, a mere *brutem fulmen.*

A statute of a State which confers on a city the power to establish dock and wharf lines and to restrain encroachments and prevent obstructions to such stream, does not authorize it to declare by special ordinance a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, when *in point of fact* it was *not an obstruction or hindrance to navigation.*

Yates *vs.* Milwaukee, 10 Wall., 498.

As bearing upon this point, the Supreme of the United Sta
speaking by Mr. Justice Miller in Yates *vs.* Milwaukee, 10 Wa
504, says :

"The act of the Wisconsin legislature, approved March 31, 18
confers upon the city of Milwaukee the authority to establish d
and wharf lines on the banks of the Milwaukee and Menomo
rivers, and restrain and prevent encroachments upon such riv
and obstructions thereto. And it is by this statute that the su
mary proceedings for the removal of the appellant's wharf are s
posed to be authorized. *But the mere declaration of the city cou
of Milwaukee that a certain structure was an encroachment or obst
tion, did not make it so, nor could such declaration make it a nuisa
unless it in fact had that character.*"

It is a doctrine not to be tolerated in this country, tha
278 municipal corporation, without any general laws either
the city or State, within which a given structure can be sho
to be a nuisance, can, by its mere declaration that it is one, subj
it to removal by any person supposed to be aggrieved, or even
the city itself. * * * It is true that it is said in the argume
that the city council has established a wharf and dock line un
the authority of the statute we have cited, and that Yates' dock p
jects beyond that line. No such defense is set up in the answ
and the existence of such a line, being a matter of which the co
could not take judicial notice, it cannot be taken into account he
But however this may be *we are of opinion that the city of Milwau
cannot, by creating a mere artificial and imaginary dock line, hundr
of feet away from the navigated part of the stream, and without mak
the river navigable up to that line, deprive the riparian owners of t
right to avail themselves of the advantage of the navigable channel
building wharves and docks to it for that purpose.*"

Mr. Justice Miller concludes his opinion in this case as follows:

"The decree of the circuit court is therefore reversed, with
structions to enter a decree enjoining the defendants below from
terfering with plaintiff's wharf, reserving, however, the right of t
city to remove or change it so far as may be necessary in the *act*
improvement of the navigability of the river, and *upon due compe
sation made.*"

279 Dutton *vs.* Strong, 1 Black., 25.
The Railroad Co. *vs.* Schurmeier, 7 Wall., 272.
Walker *vs.* Shepardson, 4 Wis., 486.

The legislature cannot confer upon a municipality judici
powers. The city in the absence of congressional action may esta
lish a wharf line; and it may pass an ordinance with penalty f
disobedience; if not obeyed, it can bring an action to enforce t
penalty; the validity of the ordinance can then be tested. It m
pass a law to provide for the punishment of any man who obstru
a highway, and providing for its abatement if it is *judicially* det
mined to be an obstruction, but it cannot pass an ordinance decl
ing *as a fact* that Montgomery's wharf is an obstruction to a hig
way, which declaration is of itself *conclusive* of such alleged fact, a

binding on Montgomery, for that would be an exercise of *judicial* power. That would be depriving a person of his property without a hearing, and *without due process of law.*

Bridge *vs.* Railroad Co., 3 Meerson & Welsby, 244.
Davies *vs.* Mann, 10 *id.*, 546.
Mayor of Colchester *vs.* Brooke, 7 Q. B., 339.
Harrower *vs.* Ritson, 37 Barb., 301.
280 Yates *vs.* Milwaukee, 10 Wallace, 497.
14 amendment Const. U. S.
Art. I, sec. 18, Const. Oregon.

It is not within the power of any State to declare that a public nuisance which is not so at common law, or which is not so *as a matter of fact.*

Cooley on Constitutional Limitations, 6 ed., 741, note.
Everett *vs.* Council Bluffs, 46 Iowa, 67.
Butchers' Union *vs.* Crescent City, 111 U. S., 746.
Railroad Co. *vs.* City of Joliet, 79 Ill., 44.

The question of a nuisance or obstruction must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a State can declare any particular business or structure a nuisance in such a summary mode and enforce its decision at its own pleasure.

Yates *vs.* Milwaukee, 10 Wallace, 498.

"Whether a nuisance or not," that is, a bridge or pier, "is
281 a *question of fact;* and where they are confined to the shore, and no positive law or regulation was violated in their erection, the presumption is that they are not an obstruction, and he who alleges the contrary must prove it."

Dutton *vs.* Strong, 1 Black., 32.

Whether a particular use of private property constitutes a nuisance is a *judicial* and not a legislative question.

15 A. & E. Enc. of Law, 1178–1180 and note.
Milne *vs.* Davidson, 16 Am. Dec., 195.

Mr. Chief Justice Moore, in Grady *vs.* Dundon, 30 Oregon, 337, said:

"The power to appropriate private property to public use is derived from the Lesislative Assembly, which may prescribe the mode of its exercise, and must provide a judicial tribunal for the determination of *certain facts* as a prerequisite to the exercise of such power. The legislature cannot dispense with notice of some kind to the owner of the property affected, for to do so would be a violation of the fourteenth amendment to the Federal Constitution, and tantamount to a deprivation of property without due process of law."

282 Grady *vs.* Dundon, 30 Oregon, 337.
14th amendment to the Constitution of the United States.
2 Kent's Commentaries, 340.
Bridal Veil Lumbering Co. *vs.* Johnson, 30 Or., 205.

The supreme court of the State of Connecticut, in the case of
Hartford *vs.* Hartford Water Commissioners, 68 Connecticut, 32
Atlantic Rep., 786), held that:

"The question whether an inhabitant of a town, desiring t
tain water, lives within a 'reasonable distance from the line of
pipes,' within the meaning of the statute requiring the boa
water commissioners to furnish water to all residents of said
within that distance, *is a question for the courts to determine*, and
decision of the board of commissioners is not conclusive or binding."

This court, in Smith *vs.* Minto, 30 Oregon, 351, opinion by
Justice Bean, in construing a clause in the present city chart
the city of Portland (Laws 1891, page 823, *et seq.*) held:

"That the power of the city council, in the matter of street
provements is a special one, and must be exercised in s
283 conformity with the authority conferred. Thus, where a
charter gives the council power to order a street impr
whenever it shall be unsafe, the street must be *unsafe in fact*, or
improvement will not be binding on the property-owners. *Th
olution of the council declaring the street dangerous is not conclusi
the courts.*"

Smith *vs.* Minto, 30 Oregon, 353.
2 Dillon on Munic. Corp., 4 ed., sec. 800.

The principle recognized by the foregoing authorities was ado
by this court in Grossman *vs.* City of Oakland, 30 Oregon,
opinion by Mr. Chief Justice Bean, who said, page 483:

"The charter of the city confers upon it the power to prevent
restrain nuisances and to 'declare what shall constitute a nuisa
But this does not authorize it to declare a particular use of prop
a nuisance, unless such use comes within the common law or
utory idea of nuisances." Quoting many authorities.

The court proceeding further says:

"By this provision of the charter the city is clothed with
thority to declare by general ordinance under what circumsta
and conditions certain acts or things injurious to health or dan
ous to the public, are to constitute and be deemed nuisa
284 leaving the *question of fact* open for *judicial determinatio*
to whether a particular act or thing complained of co
within the prohibited class; *but it cannot by ordinance arbitrarily
clare any particular thing a nuisance which has not heretofore bee
declared by law, or judicially determined to be such.* (City of De
vs. Mullen, 7 Colorado, 345; 4 A. & E. Corp. Cases, 304; 3
693.")

Grossman *vs.* City of Oakland, 30 Oregon, 478.

Wharves and docks are essential elements to the existenc
foreign and interstate commerce, as are harbors and ships.

XXVI.

Mr. Justice Field, in his opinion in Gloucester Ferry Co. *vs.* P
sylvania, 114 U. S., page 205, says:

"No foreign or interstate commerce can be carried on with

citizens of a State without the use of a wharf, or other place within its limits on which persons and freight may be landed and received, and the existence of a power in a State to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce, for the use of such places, would be inconsistent with and entirely subversive of the power vested in Congress over such commerce."

285 The Supreme Court of the United States in the case of Transportation Co. *vs.* Parkersburg, 107 U. S., 701, says:

"Wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river."

The court proceeding in the case, *supra*, Transportation Co. *vs.* Parkersburg, says:

"Now while wharves, levees and landing places are *essential to commerce by water*, no less than a navigable channel and a clear river. But they are attached to the land; they are private property, real estate, and they are *primarily*, at least, subject to the local State laws. Congress has never yet interposed to supervise their administration. It has hitherto left this exclusively to the States. * * * When it shall have done so, it will be time enough for the court to carry its regulations into effect by judicial proceedings properly instituted. But, until Congress has acted, the courts of the United States cannot assume control over the subject as a matter of Federal cognizance. It is Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject.

"Wharves, quays, piers and landing places for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early

286 period in the colonial times; and in point of fact the right to build such erections has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time." This case was decided at the October term, 1882, long before Congress had taken jurisdiction of the subject.

Dutton *vs.* Strong, 1 Black., 33.

Angell on Tide Waters, 196.

In Dutton *vs.* Strong, 1 Black, 25, *supra*, the Supreme Court in discussing the subject of the erection of wharves and docks, said:

"Wherever the water of the shore, so to speak, is too shallow to be navigable, there is the same necessity for such erections as in the bays and arms of the sea; and where that necessity exists it is difficult to see any reason for denying to the adjacent owner the right to supply it; *but the right must be understood as terminating at the point of navigability*, where the necessity for such erections ordinarily ceases."

Again, in the case of Ouachita Packet Co. *vs.* Aiken, 121 U. S., 444, the court held that:

"Wharfage is, *in the absence of Federal legislation*, governed by local State laws." And further: "The case is clearly within the

principles of former decisions of this court, which affirmed
287 the right of the State, *in the absence of regulation by Congress*, to establish, maintain and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce. * * * Wharfage, the matter now under consideration, is governed by the local State laws. *No act of Congress has been passed to regulate it.*"

In every case decided by the Supreme Court of the United States, prior to the act of 1888, as amended September 19, 1890, taking jurisdiction of harbor lines in the navigable waters of the United States, the court in recognizing the authority of the State has *invariably* held that the National Government had not, at the date of such decisions, respectively, assumed any jurisdiction, and that therefore there was no question as to the right of the State to act. For instance, the court, speaking through Mr. Justice Bradley, in the case of Transportation Co. *vs.* Parkersburg, 107 U. S., 691, said:

"Although wharves are related to commerce and navigation as aids and conveniences, yet, being local in their nature and requiring special regulations at particular places, the jurisdiction and control thereof, *in the absence of congressional legislation on the subject*, properly belong to the States in which they are situated."

We readily concede, and in fact it is universally conceded by the profession, that a city may, if authorized by its charter, in the exercise of the police power of the State, regulate and even abso-
288 lutely inhibit the construction and use of any building or business whatever which affects the public health, the public morals, or the public safety.

As was said by the Supreme Court of the United States, speaking of the police power of a State, by Mr. Justice Brown in Lawton *vs.* Steele, 152 U. S., 136:

"Under this law it has been held that a State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contageous diseases; the restraint of vagrants, beggars and habitual drunkards; the suppression of obscene publications and houses of ill fame; the prohibition of gambling-houses and places where intoxicating liquors are sold."

All of these, it will be observed, come under the one or the other of the three heads, of the protection of the public health, public morals or the public safety.

But we concede there are certain other matters of legisla-
289 tion that come under the police power—that is, where the interests of the public are involved, and where measures are necessary for the protection of the public interests; but "to justify a State in thus interposing its authority in behalf of the public it

must appear, *first*, that the interests of the *public generally*, as distinguished from those of a particular class, require such interference; and, *second*, that the means are *reasonable and necessary* for the accomplishment of the purpose, and not unduly oppressive upon individuals. And also that the means resorted to *in nowise conflict with any Federal law or regulations*. The legislature cannot, under pretense of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

In other words, its determination as to what is a proper exercise of the police power is *not final* or *conclusive*, but is subject to supervision by the courts.

Lawton *vs.* Steele, 152 U. S., 137.

The Supreme Court of the United States in Lawton *vs.* Steele, 152 U. S., 137, in speaking further of the police power, and also as to the non-conclusiveness of the decision of the State as to what is a proper exercise of the police power, said:

"In other words, its determination as to what is a proper exercise of its police powers, *is not final or conclusive, but is subject to*
290 *the supervision of the courts.* Thus an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the State against any expense for the support of the persons named for four years thereafter, was held by this court to be *indefensible* as an exercise of the police power, and to be *void* as interfering with the right of Congress to regulate commerce with foreign nations. Henderson *vs.* New York, 92 U. S., 259. A similar statute of California requiring a bond for certain classes of passengers described, among which were 'lewd and debauched women,' was held to show very clearly that the purpose was to extort money from a large class of passengers, or to prevent their immigration to California altogether, and was held to invade the right of Congress. Chy Lung *vs.* Freeman, 92 U. S., 275. So in Railroad Co. *vs.* Husen, 95 U. S., 465, a Statute of Missouri which prohibited the driving of Texas, Mexican, or Indian cattle into the State between certain dates in each year, was held to be in conflict with the commerce clause of the Constitution, and not a legitimate exercise of the police powers of the State, though it was admitted that the State might for its self-protection prevent persons or animals having contagious diseases from entering its territory. In Rockwell *vs.* Nearing, 35 N. Y., 302, an act of the Legislature of New York which authorized the seizure and sale without judicial process, of
291 all animals found trespassing within private enclosures, was held to be obnoxious to the constitutional provision that no person should be deprived of his property without due process of law. See also Austin *vs.* Murray, 16 Pick., 121; Waterton *vs.* Mayo, 109 Mass., 315. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves,

and which might be carried on without detriment to the public interests."

The First and Second Assignments of Error (Appellants' Abstract, 50) Abandoned in Brief and Argument.

XXVII.

We take it for granted counsel do not insist on their first and second assignments of error (Abstract of Record, 50) as no mention is made of either in the brief. We, therefore, have not discussed them, as we assume they are abandoned. They relate to the overruling by the court below of the demurrer and motion to strike out.

292 Neither the City nor Port of Portland has, in any event, any right or jurisdiction to excavate, widen and change the location or capacity of the Portland harbor, unless the plan of such proposed work is first submitted to the Secretary of War, and the work has been approved and authorized by him.

XXVIII.

Counsel for appellants, it seems to us, have been rather disingenuous in their quotation from what they call the seventh (it should be the fourth) finding of fact, which states among other things that a copy of the act incorporating the Port of Portland was transmitted by the president of said port to the then Secretary of War, etc. Counsel omitted a very important and qualifying portion of that finding. The quotation of counsel in their brief is as follows:

"Said finding further shows that 'soon after the passage of said act incorporating the Port of Portland, a copy of the same was transmitted by the president of said Port of Portland to the then Secretary of War, who approved the same; and that the work of the said Port of Portland in improving the Columbia and Willamette rivers has been conducted in conjunction with the United States engineers in charge of said rivers, acting under instructions from the Secretary of War, and said engineers have annually reported to said Secretary the nature and extent of said work by said Port of Portland." (Appellant's Brief, 27–28.)

293 Counsel then make upon this finding of fact the following observation:

"We claim that this finding shows that all the jurisdiction and power of the State over the Willamette river, including the harbor of Portland, is vested in said corporation, the Port of Portland, and that the Secretary of War has expressly consented that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment."

We now here give the whole of the fourth (erroneously designated as the seventh in appellants' brief) finding of fact bearing upon that point, placing in *italics* that portion of it omitted by counsel for appellants in their statement as above:

"That soon after the passage of said act incorporating the Port of Portland, a copy of the same was transmitted by the President of said Port of Portland to the then Secretary of War, who approved the same, and that the work of the said Port of Portland, in improving the Columbia and Willamette rivers, has been conducted in conjunction with the United States engineers in charge of said rivers, acting under instructions from the Secretary of War, and said engineers have annually reported to said Secretary the nature and extent of said work by said Port of Portland. *But there is no evidence*
294 *in the case showing or tending to show that any dredging or other work of any kind whatever in the improvement of said Willamette river has ever been done by the said Port of Portland, on the inside or land side of the harbor line as relocated by the Secretary of War, September 23, 1898, or in the vicinity thereof, either above or below the same, nor that the Secretary of War has at any time suggested or recommended any such dredging or widening of the channel in that locality.*"

In their brief, page 28, counsel for appellants in referring to the act incorporating the Port of Portland, section 3 of which is included in the findings, say:

"We claim that this finding shows that all the jurisdiction and power of the State over the Willamette river, including the harbor of Portland, is vested in said corporation, the Port of Portland, *and that the Secretary of War has expressly consented* that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment."

We submit there is nothing in the record of this case which justifies the broad statement "that the Secretary of War has expressly consented that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment."

But suppose it is true! Where, we inquire of the learned
295 counsel, does the Secretary of War get jurisdiction or authority to so "*expressly*" or even *inferentially*, consent, that the right to improve two among the largest navigable rivers in the United States—one of which separates two States of the Union for nearly four hundred miles, and the improvement of which has by Congress been *expressly* placed under his control—shall attach to a corporation organized under a State law of the State of Oregon? Surely here the argument *delegatus non potest delegare* applies.

It does not appear from anything in the bill of complaint in this case, or any finding of fact, or any evidence, that any plan of the proposed works for widening the Willamette river at the port of Portland, or for excavating so as to change or modify the course, location, condition or capacity of the channel of said harbor, has ever been submitted to the Secretary of War by the Port of Portland, much less that the Secretary of War has ever approved or authorized such plan; and, yet, it is provided in the latter clause of section 7, of the act of 1890, as amended by the act of July 13, 1892, Supplement to the Revised Statutes U. S., vol. 2, page 30, as follows:

"And it shall be unlawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, *or*

other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, *under any act of the Legislative Assembly of any State*, until the location and
296 plan of such bridge or *other works* have been submitted to and approved by the Secretary of War, or *to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge*, or inclosure within the limits of any breakwater, *or of the channel of any navigable water of the United States*, unless approved and authorized by the Secretary of War."

In view of this section of the act of Congress can it be held that the Port of Portland can commence "*to excavate*" or in any manner "to alter or modify the course, location, condition or capacity of the channel of the navigable waters of the Willamette river at Portland, unless the "*location and plan*" of such proposed "*work*" or "*excavation*" is first submitted to the Secretary of War, and the same is "authorized and approved by him"?

The anomalous condition and character of shore bed and contour and bed of river in front of Montgomery's property demand change of location of harbor line in the public interest.

XXIX.

Counsel say in their brief, page 31 :

"Mr. Montgomery says that the change will save him some expense in dredging. But this is an argument that all the wharf owners in Portland might have made for a change in the harbor lines."

297 The answer to this is that the record in this case discloses the fact that the conditions, both as to depth of water, character of formation of shore bed and bed of river in the vicinity where this line was changed, and the contour of the shore line, are wholly anomalous and different from most other places on either side of the river in the city of Portland.

First. It is an historical fact that the most of the wharves and docks located on the west side of the river within the city limits, and which are owned principally by persons who are opposing Mr. Montgomery, were built without any expense of dredging whatever, and into water from twenty-five to thirty feet in depth. In Mr. Montgomery's case it is altogether different. Chief Engineer Wilson, in his report to the Secretary of War (Abstract, 40) finds that the harbor line in front of Mr. Montgomery's property, as established August 9, 1892, runs across "*a bed of hard material which has defied the erosive power of the current during freshets*," and General Wilson says:

"In an engineering point of view, and in the interests of commerce, I cannot believe that any immediate and future material damage will result from granting his (Montgomery's) request."

And further, that the desired change will "avoid the expense of removing about 22,000 cubic yards."

Again, Hon. Henry Failing in his communication to Gen-
298 eral Wilson, Chief of Engineers, of date June 3, 1898, which letter is given in full hereafter, in referring to the harbor line in front of Mr. Montgomery's property established August 9, 1892, says:

"The line as established strikes across a point of land where the water is very shallow, and to reach deep water with warehouse and dock would entail a great expense for dredging and blasting, a *large portion of the material being cement gravel.*"

But still further defendant in his answer, which is not denied by any replication, and therefore must be taken as true, says:

"The defendant avers that if restricted in the erection of his wharf to the harbor lines as established August 9, 1892, the cost of dredging, in order to obtain the necessary depth of water to enable ships to come to the wharf would be so enormous as to wholly prevent the improvement; that the bottom of the river, at, along and in front of defendant's said property consists in a great part of cement gravel, which would require blasting, and defendant avers, although permitted to construct his wharf up to the harbor line as established by the Secretary of War September 23, 1898, along which the water ranges in depth from three to thirteen feet at one point, the average depth of water along said line in front of the proposed wharf and warehouse being not over five or six feet, he will be com-
pelled to spend a very large amount of money in dredging
299 in the character of ground as stated, in order to enable ships of ordinary draught to come to his wharf at low water.

(Appellant's Abstract of Record, 24.)

And further Major Fisk in his fourth objection in his report on the case to the Chief of Engineers, concedes the dredging difficulties in front of Mr. Montgomery's property. He says, (Abstract, 39:) * * * "Although the dredging at the place under discussion would probably *be in a material harder than in most other localities.*"

Reflections in brief for appellants on General Wilson, Chief of Engineers, and acting Secretary of War Meiklejohn, not warranted by the record.

XXX.

Counsel in their brief say (page 31):

"He (Montgomery) takes the papers with some letters from his personal friends and goes to Washington. He applies to the Chief of Engineers, who overrules some of the objections of Major Fisk, but
does not recommend the change. Mr. Meiklejohn, the act-
300 ing Secretary (who perhaps never saw the Willamette river) without giving the City of Portland or the Port of Portland, or the *chamber of commerce* any chance for a hearing, makes the change."

These statements assume, and counsel would have the court believe, that neither General John M. Wilson, Chief of Engineers of the U. S. Army, nor Hon. G. D. Meiklejohn, acting Secretary of War, considered and determined this controversy on the pleadings

and evidence and the report sent up by Major Fisk, but that th
decisions respectively were influenced and controlled by outside p
sonal influence of Mr. Montgomery and his friends. This is an u
warranted personal reflection, as unjust as it is untrue, on bo
General Wilson and Secretary Meiklejohn, and the well-known hi
character both personally and officially of each of these gentleme
is an altogether sufficient answer to this libelous innuendo.

The carefully prepared report of General Wilson to the Secreta
(Abstract of Record, 38–41) discloses the fact that he gave caref
consideration to Major Fisk's report, considering *seriatum* each
the objections, suggested by him, and concluded his report as f
lows:

"After a careful study of the subject I see no objection to granti
this request, other than the establishment of a precedent upon whi
other applications may hereafter be based. This, in my opinion,
an important objection *for the consideration of the Secretar*
301 It will thus be seen that Chief Engineer Wilson, after co
sidering each of the objections bearing *hydrographically* a
scientifically upon Mr. Montgomery's application, overruled them a
giving specific, scientific and engineering reasons therefor, but l
for the consideration and determination of the Secretary primari
and finally the *sole* objection, as to whether the establishment o
precedent, upon which other applications might be based, shou
prevail.

The statement of counsel that *Secretary Meiklejohn* "made t
change without giving the City of Portland, or the Port of Portla
or the chamber of commerce any chance for a hearing" is n
altogether free from disingenuousness. General Wilson's report w
submitted to the Secretary of War September 1, 1898. The case w
pending before the Secretary *twenty-three days*, when on Septemb
23, 1898, it was decided by acting Secretary Meiklejohn. The a
ing Secretary, moreover, was under no obligations by any law, ru
or regulation, either legal or moral, to issue a notice to the app
lants, much less to the *chamber of commerce*, which was in no sense
party to the proceedings. The City of Portland and the Port
Portland *were* notified, and appeared and were heard, before Maj
Fisk by written protests, objections and arguments, all of whi
were forwarded by Major Fisk to the Chief of Engineers, and by hi
considered and transmitted to the Secretary of War. If they desir
to be heard further, before either the Chief Engineer or t
302 acting Secretary, either by way of further testimony, prote
arguments or otherwise, whose fault, we would inquire, b
their own is it if they were not heard?

Appellants' Change of Base.

XXXI.

The weakness of the case of appellants is fully disclosed by t
fact that counsel have in their brief and argument before this ho
orable court almost wholly changed their base and theory co
tended for in the court below.

In the printed brief and argument of counsel upon which this suit was commenced and argued in the lower court, the *nervus probandi* relied on to sustain the jurisdiction of the State, and the action of the City and Port of Portland thereunder, was, "inasmuch as the Willamette river is wholly within the State of Oregon, therefore, the State has *exclusive* jurisdiction." In that printed brief and argument counsel said:

"The Willamette river is exclusively within the State of Oregon. Numerous decisions have been made by the Supreme Court of the United States as to the jurisdiction of a State over the navig-
303 able waters exclusively within its lines."

And in order to sustain this proposition the following authorities were cited:

Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 242.
Withers *vs.* Buckly, *et al.*, 20 How., 84.
The Willamette Iron Bridge Co. *vs.* Hatch, 125 U. S., 1.
The Passaic Bridges, 3 Wall., 782.
Gilman *vs.* Philadelphia, 3 Wall., 724.
Pound *vs.* Turk, 95 U. S., 459.
Huse *vs.* Glover, 119 U. S., 543.
Sands *vs.* Manistee River Imp. Co., 123 U. S., 288.

But in their printed brief in *this* court this position seems to have been wholly abandoned, and not one of the authorities, *supra*, except the single case of Willamette Iron Bridge Co. *vs.* Hatch, is either cited or referred to. While on page 12 of their brief in this court, counsel say:

"Counsel in the court below cited numerous cases, commencing with Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 251, and coming down to Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 203, to show that whenever and wherever Congress has established regu-
lations of commerce the State has no right to interfere."

304 The fact is, counsel for plaintiffs having cited the case of Wilson *vs.* Blackbird Creek Marsh Co., *supra*, as their first authority to sustain their proposition, *supra*, we cited, examined and discussed the case in our brief and argument in the court below, for the purpose of showing that the case, so far from sustaining the proposition of counsel for appellants, was in full support of the theory claimed by us; and counsel for appellants have evidently become satisfied that this is so, for they have neither cited it, nor made any reference to it whatever, except as above, in their brief and argument in this court.

Counsel in their brief, page 17, say:

"The State does not wish to prevent the construction of a wharf by Mr. Montgomery. All that it proposes to do is to regulate the size of his wharf, so that its river front shall conform to the other wharves in the city. We submit that this is a reasonable and just regulation."

The trouble, however with this effort upon the part of the State to make the river front of Montgomery's wharf conform to the other

wharves in the city is that a higher power than the State, the National Government, has already done so.

305 Appellants are estopped from denying the jurisdiction of the Secretary of War to establish harbor lines.

XXXII.

It is respectfully submitted, appellants are by their pleadings estopped (paragraph III, bill of complaint), from insisting that the Secretary of War is without jurisdiction to establish the harbor lines in the Portland harbor. In the bill of complaint, they make the following averment:

"On the ninth day of August, 1892, the *United States engineers* established wharf lines in the Willamette river within said city of Portland."

Bill of complaint, paragraph III, abstract 2.

And further in paragraph IV, bill of complaint, abstract 2, they aver that "the city on December 12, 1892, established wharf lines in conformity to and coincident with the wharf lines *established by said United States engineers* as aforesaid."

And further they aver in said bill of complaint, paragraph VII (Abstract 6) that the Port of Portland on November 2, 1898, established and fixed wharf lines of the Port of Portland on both sides of the Willamette river, "the same as that heretofore and prior to the first day of July, 1898, *established by the United States engineers*."

It will be seen, therefore, appellants base their claim at the very outset on the *wharf lines established by the National Govern-*
306 *ment*. There is, moreover, no averment or claim in the bill of complaint to the effect that the Secretary of War was without jurisdiction or power to establish harbor lines.

A Legal Boomerang Proposition.

XXXIII.

Counsel insist all through their brief and argument (Brief, 25 and 29) that while the State may not have any jurisdiction on the *outside* of the harbor line established by the Secretary of War, that its jurisdiction *inside* such line is not open to dispute.

They further insist that the only true wharf lines, if any, ever established by the Secretary of War, or, as they term it, "*wharf lines established by the United States engineers*" (bill of complaint, paragraph III, Abstract 2), are those established August 9, 1892. Then they say in their brief, page 24:

"We admit for the sake of the argument that the State has no right to obstruct the river *outside* of the harbor lines fixed by the Secretary of War, but otherwise it has an absolute right to protect the channel and fix the dimensions of its harbor according to its own judgment."

307 If, then, the harbor line established by the Secretary of War, August 9, 1892, is the only real harbor line established

by him, and if, as contended by counsel, he had no right to change the same in September, 1898, then by what right can the City or the Port of Portland interfere *outside*, or on the river side, of said line. They admit in their, argument, as also in the bill of complaint, that the Secretary of War, through the United States engineers, established this line August 9, 1892. They admit they have no jurisdiction *outside*, or on the river side, of said line, but only on the *inside*, or land side, of said line; and yet their only complaint of Mr. Montgomery is on account of what they allege he is doing on the *outside* or river side of said line, where they concede the State has no jurisdiction.

It is submitted this argument upon the part of counsel for the appellants involves what might be properly termed a compound *non sequitur*.

A Recent Case Directly in Point.

Since dictating the previous portion of this argument, we have received the advance sheets of the Federal Reporter, issued April 4, 1899, containing the decision of the United States circuit court of appeals, opinion by Circuit Judge Jenkins, in the case of The People of Illinois *vs.* The Illinois Central Railroad Co., and which will be reported at page 955 of 91 Federal Reporter, when issued.

308 In the case of Illinois *vs.* The Illinois Central Railroad Co., 146 U. S., 387, cited by counsel for appellants and hereinbefore referred to, the Supreme Court of the United States, after holding that a riparian owner on Lake Michigan had the right to maintain piers extending into the lake "*to a point of practicable navigability*," directed the trial court by its mandate to determine whether piers previously built extended beyond such point "having reference to the manner in which commerce in vessels is conducted on the lake."

This case came up recently on this mandate before the circuit court of appeals, seventh circuit, and was decided February 11, 1899.

Advance sheets, Fed. Rep., April 4, 1899, page 955, and will be page 956 in 91 Fed. Rep., not yet issued.

The opinion of the court was delivered by Jenkins, circuit judge, who, in his opinion, says:

"We take it that the riparian right to penetrate the waters of the lake to a point of navigability, which is recognized by the decision of the Supreme Court in this case, is not a right that is concluded and exhausted by the single exercise of it, but that the owner has a right at all times to reach the point of practical navigability as it may exist from time to time. The pier that sufficed when

309 the great lakes were navigated by vessels not exceeding one hundred and fifty tons burden would of course be wholly insufficient to meet the demands of commerce at this time, when the waters are plowed by vessels of 4,000 tons burden and over. The right is a *relative* right, having relation, in the language of the Supreme Court in this cause, 'to the manner in which commerce in

vessels is conducted on the lake.' To serve any useful purpose these piers must reach water of sufficient depth to float vessels when laden, and *alongside of which vessels can be conveniently brought to be loaded and unloaded.* A sufficient depth of water to float vessels such as navigate the waters of the lake is essential, and *is a necessary incident of the riparian right that the piers shall penetrate the water to a distance from the shore necessary to reach water which shall float vessels, the largest as well as the smallest,* that are engaged in the commerce of the lakes. Atlee *vs.* Packet Co., 21 Wall., 393; Langdon *vs.* Mayor, etc., 93 N. Y., 151."

Judge Jenkins, further in his opinion, quotes with approval the case of Atlee *vs.* Packet Co., 21 Wall., 393, in which the Supreme Court of the United States, speaking through Mr. Justice Miller said:

"These structures, wharves, levees, piers and other landing places on navigable rivers, which are built and owned by individuals, and which are projected into the navigable channel of a river, are allowable in a part of the river which can be used for navigation, on the ground that they are *essential aids to navigation itself.* The navigable streams of the country would be of little value for that purpose if they had no places where the vessels which they floated could land, with conveniences for receiving and discharging cargo, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. *Wharves and piers are as necessary almost to the successful use of the stream in navigation as the vessels themselves,* and are to be considered as an important part of the *instrumentalities of this branch of commerce.* But to be of any value in this respect they must reach *so far into deep water as to enable the vessels used in ordinary navigation to float while they touch them and are lashed to their sides.* They must of necessity occupy a part of the stream *over which a vessel could float if they were not there.*"

Circuit Judge Jenkins, after quoting from the opinion of Chief Justice Ryan in 46 Wis., 244, further said:

"We think it must be, as stated by Chief Justice Ryan, that the extent of this riparian right is purely a relative question, and is limited only to the line of navigability upon a particular stream or body of water. That line of navigability is *a shifting line;* it is *one thing today and quite another thing tomorrow.*"

This recent case in the circuit court of appeals it will be seen is directly in point, *first,* as to the duty of the Secretary of War under the act of Congress to change the harbor line whenever the circumstances seem to demand it, and, *second,* upon the right of the riparian proprietor to build out to deep water and meet the ships with his wharf.

We must be pardoned for calling attention to this case out of regular order, as the report has just reached us.

We attract the attention of the court to the recent decision of the Supreme Court of the United States in the Lake Shore & Michigan Southern Railroad Co. *vs.* State of Ohio, decided February 20, 1899

opinion by Mr. Justice Harlan, which supports in several respects the views we have urged in this case.

This case will be reported in 173 U. S., not yet issued.

The dockage and warehouse facilities of the port of Portland are inadequate to meet the demands of foreign and interstate commerce.

XXXIV.

This statement as to the shortage of dockage and warehouse room is supported by the record in this case. We here give a copy of a communication from the late Honorable Henry Failing, to General John M. Wilson, corps of engineers U. S. Army,
312 which speaks for itself. (Abstract of Record, 42.) This communication was before Major Fisk, General Wilson, and Secretary Meiklejohn when the case was being considered.

"FIRST NATIONAL BANK,
"PORTLAND, OREGON. *June* 23, 1898.

"General John M. Wilson, corps of engineers, U. S. Army, Washington, D. C.

"SIR: I am informed that Mr. J. B. Montgomery of this city has petitioned for a relocation of the wharf line established in front of his property, and that of the Northern Pacific Terminal Company, leased and used by the O. R. R. & Navigation Company. The line as established strikes across a point of land where the water is very shallow, and to reach deep water with warehouse and dock would entail a great expense by dredging and blasting, a large portion of the material being cement gravel. I am naturally opposed to any contraction of the waterway, which would affect the channel injuriously, and I therefore consulted Captain Cleveland Rockwell, who was for some years in charge of the survey here, and who is quite conversant with the river channel. I have not seen Captain Fisk about the matter as I understand he has already made his report. I have great confidence in Captain Rockwell's knowledge and opinion concerning the matter, and he assures me that the change asked for will not injure the channel, and would be but justice to the owners affected.

"I have been much interested in the erection of *additional warehouse room for wheat storage, especially on the east side of the*
313 *river*, where the product of the Columbia valley is received. As you may observe, the yield of wheat east of the Cascades has greatly increased, and the experience of last year *has demonstrated the great lack of storage room.* The present year promises a much larger export of grain than from the most abundant crop of 1897–1898. The O. R. R. & Navigation Company *has been much hampered the past year, because of the lack of storage room, having at times hundreds of flat cars laden with wheat on their tracks* subject to damage, besides loss of use of flat cars. I have had several conversations with President Mohler of the O. R. R. & Navigation Company and other directors of the company, *concerning the necessity for*

providing further warehouse room, especially on the east side and be
the bridges. I regret that in the absence of Mr. Mohler, I am not
possession of the statistics which he has laid before me from ti
to time, to show the *pressing necessity for more storage room.* It is
impression that Mr. Mohler told me that he had *for long periods*
300 cars of wheat on the track awaiting storage. I presume the inc
ing crop will be 500,000 or 600,000 tons for export, and the grea
portion of this grain must go into warehouse, pending the load
of ships. All this goes to show that *owners of wharf property ou*
not to be hampered in the erection of warehouses, and that the public
terest is greatly involved I do not profess to have any skil
314 knowledge of the effect of change of line on the channel,
if not found to be injurious, it seems to me that the cha
asked for should be granted.

"Very respectfully yours,

"(Signed) HENRY FAILING.

This letter of Mr. Failing is concurred in by Mr. Mohler as
lows:

"I fully concur with these statements.

A. H. MOHLER,
President O. R. R. & N. Co.

The record also shows a letter, of which the following is a co
addressed by Mr. Mohler to General Wilson:

"THE OREGON RAILROAD & NAVIGATION CO.,
"PORTLAND, OREGON, *August* 19, 189

"Gen. John M. Wilson, Chief of Engineers, U. S. Army, Washingt
D. C.

"GENERAL: I attach hereto a letter from our chief engineer,
W. H. Kennedy, who has been with this company and a resident
this State for many years.

"The question as to whether the extension of the harbor lin
an encroachment or not is a *scientific* one; one which I am not p
sonally able to pass upon. *The necessity for increased stora*
315 particularly on account of our increased interests in the Pac
Ocean countries, *make it necessary to enlarge our facilitie*
this point and utilize all available space.

"This company operates more ships on the Columbia river *th*
any other interest, in fact more than any *two interests*, and it is, the
fore, directly interested in not contracting the harbor line so as
interfere with free navigation.

"As I stated before, the question is a scientific one, and I assu
Mr. Fisk, who has always been pleasant, courteous and consider
in his dealings with the people and corporate interests along
navigable waters of Oregon, somewhat hesitates to recommend
departure from the harbor lines which have been established by
predecessors.

"This company desires no personal advantage whatever; it
looking to the broader question of sufficient facilities, and if it

shown that the proposed harbor extension is detrimental and injurious, *which would certainly affect our property to a larger extent than others*, this company would not for a moment make the recommendation.

"Yours truly, A. H. MOHLER."

But still further respondent, in his separate answer (Appellants' Abstract of Record, 23–24), makes the following averment:

316 "Defendant further avers that one of the purposes of the construction of the wharf by him is to erect thereon a large and commodious warehouse for the storage of grain for shipment; that the *warehouse facilities for the port of Portland are wholly insufficient in number and capacity to meet the demands of shippers.*"

This averment is not denied by any replication, therefore, must be taken to be true.

The public interests are vastly subserved by the construction of Montgomery's wharf and warehouse.

XXXV.

We respectfully insist in conclusion, that, in view of the whole record in this case, the construction of the respondent's wharf and warehouse at the place and in the manner he is constructing the same, so far from being an injury, is a *positive benefit to the commerce and shipping interests of the port.* There is a great shortage of warehouse room, as appears from the record, especially on the east side of the river, and Mr. Montgomery so far from being characterized as sacrificing the public interests to satisfy his personal greed (Brief of Appellants, 32) should, for the public spirit he is manifesting by the expenditure of $50,000 or more, to enlarge and improve the warehouse and shipping facilities of the port, be com-

317 mended as a public benefactor. The public interests are not promoted by restricting the wharfage and warehouse facilities of the port of Portland, and by centralizing the same in the hands, and under the control of the few, and thus placing the shipping interests of the port at the mercy of a trust and, therefore, an unconscionable monopoly.

The public interests generally, and especially do the interests of *foreign* and *interstate* commerce, require adequate wharfage and warehouse accommodations, quite as much as they do a deep channel and capacious harbor.

We respectfully insist the decree of the circuit court dismissing appellants' bill and for costs should be affirmed.

STOTT, BOISE & STOUT AND
MITCHELL & TANNER,
Attorneys for Respondent.

318 In the Supreme Court of the State of Oregon, October Term, 1898.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
v.
J. B. MONTGOMERY, Defendant and Respondent.

Appeal from the judgment of the circuit court for Multnomah county—Hon. John B. Cleland, judge.

Reply Brief for Appellants.

Williams, Wood & Linthicum and J. M. Long, attorneys for appellants.

Stott, Boise & Stout and Mitchell & Tanner, attorneys for respondent.

Filed April 29, 1899.

J. J. MURPHY, *Clerk.*

319 In the Supreme Court of the State of Oregon, October Term, 1898.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
v.
J. B. MONTGOMERY, Defendant and Respondent.

Reply Brief for Appellants.

We beg to submit a few remarks in reply to the ponderous brief of the respondent.

I.

Assuming all that is said in respondent's brief as to the pleadings herein and the proceedings of the Port of Portland to be true (which is not admitted), this question remains unaffected: Has the State, through the municipal authorities of the city of Portland, the right to fix a line in the harbor of said city beyond which piles shall not be driven or wharves erected in the Willamette river?

320 II.

Assuming it to be true, as stated by defendant in his brief (page 5), that "the establishment of harbor lines in the navigable waters of the United States by Congress is an exercise of the constitutional grant of power to regulate commerce with foreign nations and among the several State," we say that Congress cannot delegate this power to any individual.

Now, if the establishment of harbor lines is a regulation of commerce between foreign nations and the several States, and Congress can delegate this regulation to the Secretary of War, it follows irre-

sistibly that Congress can delegate every other regulation of commerce to the same officer; and thus the whole power to regulate commerce which the Constitution delegates to Congress may be again delegated to an executive officer of the Government. No human ingenuity can break the logic of this argument.

To all that is said in defendant's brief as to the judiciary, army and navy, it is sufficient to say that there is nothing in the Constitution, as to these departments, similar to the clause delegating power to Congress to regulate commerce.

Miller *v.* Mayor, 109 U. S. 385, upon which defendant relies, clearly holds that the power to authorize the construction of a bridge must be exercised by Congress, and cannot be delegated. The court says: "The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate."

If Congress could not "abdicate" its authority in respect
321 to a bridge, how can it abdicate its authority as to a wharf or any other structure that might be an obstruction to navigation? Suppose Congress should pass an act conferring upon the Secretary of War the power to allow or disallow, according to his own judgment, the construction of bridges over all the navigable waters of the United States. Would not such an act be unconstitutional?

It is one thing to pass an act authorizing the construction of a bridge upon certain terms and conditions, and quite another thing to require some officer of the Government to see that such terms and conditions are complied with. One is a legislative and the other a ministerial act. U. S. *v.* Moline, 82 Fed. Rep., 596; U. S. *v.* Gravel Co., 81 Fed. Rep., 253, and U. S. *v.* Romard, 89 Fed Rep., 156, are cases which hold in effect that, Congress having prohibited certain obstructions to navigation, officers might be empowered to see that the law was executed.

Judge Grosscup, in U. S. *v.* Moline *supra*, p. 597, says that U. S. *v.* Rider, 50 Fed. Rep., 406, and U. S. *v.* Keokuk Co., 45 Fed. Rep., 178, are the only cases he knows of involving the constitutionality of the act of 1890. They are the only cases touching that question that can be found; and they both hold that said act, so far as it was involved in those cases, was unconstitutional.

Looking carefully at the cases cited by defendant's counsel, the court will see that generally, if not altogether, they relate to the prevention or removal of obstructions to navigation. But the question here is—Has the Secretary of War a right to authorize (not the removal, but) the establishment of an obstruction to navigation in the harbor of Portland? We say that the question of fact as to
whether or not the proposed wharf would be an obstruction
322 to navigation is settled by the ordinance of the city of Portland and by the decisions of the Port of Portland, and that Mr. Montgomery and this court are as much bound thereby as they would be by an act of the Oregon legislature.

We submit that the act of 1890, taking the construction put upon

it by defendant's counsel, is not only in conflict with the laws of this State, but is also indefensible under the Constitution of the United States.

III.

Our contention is that the construction and regulation of wharves are not within the purview of the commercial clause of the Constitution, otherwise than that Congress may prohibit any structure the effect of which is to impair or destroy the navigability of any navigable water of the United States.

1. Wharves, like warehouses, elevators and similar instrumentalities of travel and transportation, only indirectly or incidentally affect commerce.

2. The definition of said clause of the Constitution, as given by the Supreme Court in Veazie *v.* Moor, 14 How., 574, is as follows: "The design and object of that power, as evidenced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions which local jealousies or local and partial interests might be disposed to introduce or maintain." Under this definition, we submit that the ordinance of the city of Portland declaring that wharves shall not extend into the harbor beyond a certain line, is not embraced in or obnoxious to the letter or spirit of said clause of the Constitution.

3. It is impossible for Congress by any "uniform rule or national legislation" (to use the language of the Supreme Court in 323 Gilman *v.* Philadelphia, 3 Wall., 726), to provide for the construction and regulation of wharves, because (to quote again from the Gilman case) "they can be best regulated by rules and provisions suggested by the varying circumstances of different localities and limited in their operation to such localities. To this extent the power to regulate commerce may be exercised by the States."

IV.

We do not think our argument that the Secretary has no power to change or relocate harbor lines has been answered. The words "established" or "to be established" may of course have different meanings, dependent largely upon the context. The language of sect. 12 of the act of 1890 is: "Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation or protection of harbors," etc. The precise question here is—What is the meaning of these words? Can anything be clearer than that they imply the exercise of this power in a locality where there are no established harbor lines? Can anything be clearer than that they contemplate an existing necessity for harbor lines to protect harbors? Whatever may be said as to the meaning of the word "establishment," as used elsewhere, with reference to harbor lines, it clearly implies *permanency;* for millions of dollars are invested upon the faith of such lines, and it cannot be supposed that Congress intended to give to the Secretary the right to change these lines at his pleasure. It was not essential, nor was there any

necessity, for the preservation or protection of the harbor of Portland, that its harbor lines should be established or changed in 1898; for the harbor was amply protected by the harbor lines es-
324 tablished in 1892, upon the faith of which large amounts of money have been invested.

V.

Counsel for defendant admit, as we understand their brief (pp. 84–88,) that as all the facts are in the record that were before the Secretary of War, it is necessary, for the purposes of this suit, that it should appear from the record that the Secretary had jurisdiction. There is no room for presumption. Is it possible for this court to find, upon these facts, that it was essential to the preservation and protection of the harbor of Portland to relocate its harbor lines? There is not a word in the record to prove that such was the fact; nor can it be established as a fact. The harbor line was relocated exclusively to accommodate Mr. Montgomery, and there is no room for argument upon the subject.

Counsel, convinced of the fatal weakness of their case, here fly off into a claim that the Secretary gave permission to Montgomery to erect his wharf. They cannot escape in that way. The Secretary established or undertook to establish a new harbor line for the harbor of Portland. To enable the Secretary to exercise this power, it is necessary that certain facts should exist, as prescribed by the statute; but the record shows affirmatively that these necessary facts did not exist, and therefore his acts are void. We affirm that the Secretary has no jurisdiction over harbor lines except under the circumstances specified in the statute.

To establish harbor lines and to grant permission to build a wharf are quite different things. If the Secretary had simply given defendant permission to erect a wharf, he would have specified the locality and dimensions of the wharf, and stopped there.
325 But, instead of this, he relocates a considerable part of the east harbor line of Portland.

But assuming that all the Secretary attempted was to give the alleged permission, we have this to say:

1. We deny that the record shows that the Secretary gave Montgomery permission to erect a wharf. The application was for a relocation of the harbor line. The engineer prepared a map on which the new harbor line is indicated in red ink, and the Assistant Secretary endorsed upon the map the words: "The change in the harbor line shown in red hereon is approved. G. D. Meiklejohn, acting Secretary of War." This is all there is of it.

2. We deny that the Secretary of War could lawfully give permission to the defendant to build a wharf in disregard of the requirements of the laws of the State as to the locality or dimensions thereof. Possibly, though this may well be doubted, Congress could set aside the law of a State regulating the construction of wharves; but an executive officer of the Government cannot do so, nor can Congress lawfully confer upon him that power. We deny that Congress or the Secretary has any right to interfere with the con-

struction of a wharf in Portland, otherwise than as may be necessary to protect the interests of interstate or foreign commerce.

Defendant's counsel now rely upon sect. 7 of the act of 1890, which reads as follows: "That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines or in any navigable waters of the United States, where no harbor lines are or may be established, without the permission of the Secretary
326 of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation," etc.

Now, this section is susceptible of two constructions. One is that the prohibition as to building outside of harbor lines is absolute, and that the permission of the Secretary applies only to those waters in which harbor lines have not been but can be established. The other is that any one can build in navigable waters, without regard to harbor lines and without permission from the Secretary of War, so long as such building does not in any manner obstruct or impair navigation. We think that, upon careful consideration, the former appears to be the better and more grammatical construction; and such construction seems necessary to make this section consistent with sect. 12, which provides for regulations.

What we have said in our former brief as to regulations is sufficient; but we desire the court to keep it distinctly in mind that this act of the Secretary was not and does not pretend to be a regulation, but was nothing more nor less than a relocation of the harbor lines in Portland. And the simple question is—Had the Secretary the power to make such relocation, upon the facts as they appear in this record?

Moreover, the words, "under such regulations as may be prescribed by him from time to time," probably refer to "deposits," named in sect. 12. See U. S. *v.* Romard, *supra*. It cannot be that Congress intended that the Secretary should have the right to change the harbor lines of the great commercial cities of this country from time to time, when a single change might involve the loss of millions of dollars to individuals. It will be noticed, too,
327 that a violation of these regulations is made a crime, which is utterly inconsistent with the idea that *regulation* refers to permission to build a wharf.

We controvert another construction put upon sect. 7 by counsel for defendant. What do these words, "that it shall not be lawful," mean? They simply prohibit certain structures outside of certain prescribed limits. They do not affirm that anything shall be *unlawful within* those limits. They do not say that *anything* shall be lawful, much less that anything shall be lawful which the State prohibits. They do not mean, nor can they be construed to mean, that the State shall not have the right to prohibit the driving of piles in the harbor of Portland inside of any harbor line fixed by the Federal authorities.

VI.

Counsel for defendant try to dispose of the case in 165 U. S. 365, by saying that sect. 4 of the act of 1890 was a partial exercise of the power of Congress, and that sect. 12 was a full exercise of such power.

Exactly the reverse of this is the truth. Sect. 4 extends the jurisdiction of the United States to every bridge over navigable waters in the United States, including the right to change the same; but sect. 12 only extends the jurisdiction of the United States to such navigable waters as are without harbor lines, where the establishment of such lines is manifestly essential to the preservation and protection of the harbor. Sec. 4, as the court decides, does not exclude the jurisdiction of the State over bridges; and, for much greater reasons, sect. 12 does not exclude the jurisdiction of a State over harbors, and certainly not over harbors inside of the harbor lines.

328 VII.

We cited several cases to show what the courts held to be the police powers of a State; and the comments of counsel do not affect their sufficiency for that purpose. We will simply add what the Supreme Court says in the License cases, 5 How., 592: "The police power of a State and the foreign commercial power of Congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct and independent, and are essential to both governments." Counsel refer to the case of Lake Shore, etc., R. R. Co. *v.* Ohio, 19 Sup. Ct. Rep., 465; but the point, and the only point, decided in that case, is that a law requiring railroads to stop their trains in certain towns is within the police power of the State. Justice Shiras, in his opinion, says: "But the question of the reasonableness of a public statute is never open to the courts. It was not open to the supreme court of the State of Ohio to say whether the act in question was reasonable or otherwise. Much less does the power of the legistature of Ohio to pass an act regulating a railroad corporation depend upon the judgment or opinion of this court as to the reasonableness of such an act." See also R. R. Co. *v.* Fuller, 17 Wall., 560; Morgan *v.* Board of Health, 118 U. S., 455.

VIII.

All questions about the rights of riparian owners, it seems to us, are conclusively settled by sects. 4227 and 4228 of the Code, quoted in our brief on pages 25 and 26; but if not, we think the decision of the Supreme Court in the great case of Illinois Central R. R. Co. *v.* State of Illinois, 146 U. S. 387, ought to end the con-

329 troversy. The court says: "We also agree with the court below that the city of Chicago, as *riparian owner* of the grounds on the east or lake front of the city, between the north line of Randolph street and the north line of block 23, each of the lines being produced to Lake Michigan, and in virtue of authority con-

ferred by its charter, has the power to construct and keep in repair on the lake front east of said premises, within the lines mentioned, public landing places, *wharves*, docks and levees, subject, however, in the execution of that power, *to the authority of the State to prescribe the lines beyond which piers, docks, wharves and other structures other than those erected by the General Government may not be extended into the navigable waters of the harbor*, and to such supervision and control as the United States may rightfully exercise."

All that is said by defendant's counsel about "public nuisances" has nothing whatever to do with this case. If the defendant had erected a wharf in the Willamette river, and the public authorities had attempted to remove it on the ground that it was a public nuisance, the question discussed by counsel might arise. But the question here is, whether the State of Oregon or Mr. J. B. Montgomery has the right to fix the wharf lines in the harbor of Portland. This argument of counsel about "public nuisances" leads to the logical conclusion that every riparian owner in Portland has a right to extend his wharf into the river as far as he pleases, irrespective of any State legislation upon the subject. The contention of counsel, if adopted by the courts, would sweep out of existence every harbor and wharf line in the United States.

330

IX.

Three United States engineers of eminence surveyed and fixed the harbor lines of Portland in 1892. The common council of the city of Portland passed an ordinance making the wharf lines of the harbor coincident with this survey. Major Fisk, the engineer in charge, after a careful and personal examination of these lines, confirmed them. The Port of Portland, made up of fifteen of the most prominent commercial and business men of the city, adopted said lines and declared they were necessary for the preservation of the harbor. And now comes Mr. Montgomery and says that these lines are unreasonable, because Mr. Meiklejohn, a Nebraska gentleman, is willing to change them.

X.

We emphatically controvert the position of counsel that one object of the act of 1890 is to provide facilities for commerce, such as wharves, warehouses, etc. There is not a word or syllable in the act, from beginning to end, to support that assumption. The sole and only object of the act is to prevent and prohibit such structures as would impair or destroy the navigability of the waters of the United States. This is so plain that he who runs may read it in the act.

XI.

We had supposed it was elementary law that where the legislature organizes a special tribunal with power to decide upon questions of fact, and no provision is made for an appeal from its decision, and it acts clearly within its jurisdiction, its decisions as to such facts are conclusive until they are overthrown or impeached for fraud.

Somebody must decide as to what are navigable waters of
331 the Willamette river. If the question were left to shore-owners, their decisions might vary from five to fifty feet. We submit that if the State of Oregon has a right to protect and preserve the navigation of the Willamette river, it has and must necessarily have the right to decide what is or is not navigable water; and therefore we hold that the decisions of the State, by the Port of Portland, are binding upon the defendant.

We do not claim that the State has a right to make any unreasonable or absurd decision, or to take private property for public use without compensation to the owner; but there is nothing of that kind in this case. Mr. Montgomery owns no part of the bed of the Willamette river not subject to the control of the State for purposes of navigation.

According to the argument of counsel, every shore-owner has a right to build his wharf out to the channel of the river, if in his judgment it is necessary to do so in order to reach water deep enough to suit his interests. Wharf lines, by that method, would zigzag up and down the river according to the sinuosities of the current. Are wharf lines in our harbors to be established in that way?

Wharf lines as extensive as those in Portland will inevitably touch shoal places. Look at the map in evidence. North of and near the proposed wharf is the North Pacific Terminal Company's wharf, built upon the wharf line of 1892. South of and near the proposed wharf are the Montgomery wharf and the Columbia wharf, built upon the wharf line of 1892. But there happens to be a shoal place where Mr. Montgomery wants to build his new wharf; and so 30,000 square feet of the water of the river are to be taken from the jurisdiction of the State and put into the exclusive jurisdiction of the defendant. Ought this to be allowed?

332 XII.

Counsel assume, throughout their argument, that there is an irreconcilable conflict between sect. 12 of the act of Congress and the ordinances of Portland. This we deny. Let us put them in juxtaposition.

Sect. 12 says: "Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may and is hereby authorized to cause such lines to be established, *beyond* which no piers, wharves, etc., shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any persons who shall wilfully violate the provisions of this section, or any rule or regulation made by the Secretary in pursuance of this section, shall be deemed guilty," etc.

Ordinance 7995, approved December 12, 1892, after defining the wharf lines, enacts as follows: "All wharves or other structures hereafter built or erected on the river front of the city on the east side of the Willamette river shall not extend westerly beyond the line as laid down in sect. 1 of this ordinance, and all permits hereafter

granted by the common council for the driving of piles or erectio of structures shall conform to said line."

Giving to the act of Congress all the force of a constitution (an certainly no more can be claimed for it), the settled doctrine of th court is: "Before a statute is declared void in whole or in part, i repugnancy to the Constitution ought to be clear, palpable and fre from doubt." Cline *v.* Greenwood, 10 Or. 230; Cresap *v.* Gray, 1 Or. 345; Cook *v.* Port of Portland, 20 Or. 580; Deane *v.* Willamett Bridge Co., 22 Or. 167.

333 To overcome a State law otherwise valid, the act of Con gress must be in *conflict* with it so that they cannot both stand. Take the language of some of the cases cited by counsel:

Wisconsin *v.* Duluth, 96 U. S. 383: State laws must be "*to the con trary*" of an act of Congress.

Aldrich *v.* Beamen *et al.*, 45 Fed Rep. 125: State act was not "*in conflict*" with act of Congress. State legislature "does not come in *conflict*" with congressional legislation,—"does not *conflict* with o violate any legislation of Congress relating to commerce."

Lake Shore etc. R. R. Co. *v.* Ohio, 165 U. S. 365: "That full powe resides in the States as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence o the exercise by Congress of authority *to the contrary*, is conclusively determined."

Now, does sect. 12 do any more than to prohibit certain structure *beyond* or *outside* of the line established by the Secretary? Is it pos sible to give its prohibitory clause any wider scope? Is there any grant of power to the Secretary to do anything inside of the line established by him? Has Congress given to the Secretary the powe to say how high or how deep or how broad or how long a wharf shall be inside of such line? Is there any declaration in sect. 12 as to what a State or a riparian proprietor may or may not do inside of such line? How does the ordinance interfere with the right o the Secretary to prevent obstructions in the river beyond the line? What are the words in sect. 12 that take away the jurisdiction of the State inside of the line? There is no conflict at all, much less a clear and palpable conflict. Both the act and the ordinance

334 can stand; the one operating outside and the other inside o the Secretary's line.

The alleged conflict is made out by an inference or an argument that the act of the Secretary in relocating the harbor line repealed the ordinance. Can a State law, so necessary and just as this ordi nance, be repealed by a mere inference of doubtful import, to say the least?

While we deny that the depth of water at the old wharf line is a question which the court can examine in this case, because it has been foreclosed by the city ordinance and the acts of the Port o Portland, it is none the less a fact that for nine months in the year that line is accessible to river boats; and that at this present writing the water is eleven feet deep all along said line; and therefore the decisions of the Port of Portland ought to be treated as conclusive of the question.

Counsel is also mistaken in saying that the wharves on the west side have been built without dredging. There was not only dredging when they were built, but the river has been dredged out three times in front of the Mersey wharf since it was erected. These matters are not strictly within the record, but they are pertinent to what is said in defendant's brief.

We wish to be understood as not waiving any of our positions nor admitting the correctness of anything in defendant's brief which we have not noticed; but we respectfully submit this as our reply as to those points upon which, as it seems to us, the case must be decided.

WILLIAMS, WOOD & LINTHICUM AND
J. M. LONG, *Attorneys for Appellants.*

335 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court-room in the city of Salem, on the first Monday, the 1st day of October, 1900, present: Hon. Robert S. Bean, chief justice, Hon. Frank A. Moore, associate justice, Hon. Charles E. Wolverton, associate justice, and J. J. Murphy, clerk, the following proceedings were had on Monday the 19 day of November, 1900, the same being the 28 judicial day of said term:

THE CITY OF PORTLAND and THE PORT of Portland, Appellants, *vs.* MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, Substituted for James B. Montgomery, Respondent.	Appeal from Multnomah County.

This cause having heretofore to wit: on the 29th day of October, 1900, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration, and the court having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon, and being now fully advised in the premises finds that there is error as alleged. It is therefore considered, ordered, and decreed that the decree in this cause in the court below rendered be and the same hereby is in all things reversed and set aside.

And it appearing that the findings of fact by the court below are substantially correct and supported by the evidence herein, they are hereby adopted as the findings of fact of this court.

And as conclusions of law therefrom the court further finds:

1st. That the wharf lines established by the appellant, The City of Portland, on the 12th day of December, 1892, were then and ever since have been, the legal and authorized wharf lines of the port of Portland.

2d. That the respondent had no right to drive piles or ex-
336 tend his said wharf beyond the wharf lines so established by the appellant the said City of Portland.

3d. That the respondent, her attorneys, agents, servants, and employés should be enjoined and restrained from driving piles or putting any structure in said river outside of said wharf lines with a view to the construction of said or any wharf, and that the appellants should have a decree directing and commanding the respondent, her agents, servants, and employés, to remove all said piles driven or structures of any description made or put therein, outside of said wharf lines in the construction of said wharf.

It is now therefore further ordered and decreed that the respondent, her agents, servants, and employés, be and they are hereby enjoined and restrained from driving piles or putting any other structure in said river outside of said wharf lines with a view to the construction of said or any wharf. And the said respondent, her agents, servants, and employés are hereby directed and commanded to remove from said river all piles driven or structures of any description made or put in said river outside of said wharf lines in the construction of said wharf.

It is further ordered and decreed that the appellants recover of respondent their costs and disbursements in this court upon the appeal allowed and taxed at $141.90 and their costs and disbursements in the court below to be there taxed.

It is further ordered that the cause be remanded to the said court below and that a decree be there entered and docketed in accordance herewith.

Endorsed: "Filed Dec. 18, 1900. J. J. Murphy, clerk, by J. W. Reeves, deputy."

337 STATE OF OREGON, } *ss:*
County of Marion, }

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original as the same appears of record, and in my office and custody.

Seal of Supreme Court. In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 18th day of December, 1900.

J. J. MURPHY, *Clerk,*
By J. W. REEVES, *Deputy.*

338 THE CITY OF PORTLAND and THE PORT OF PORTLAND, Appellants,
v.
J. B. MONTGOMERY, Respondent.

Appeal from Multnomah county—Hon. John B. Cleland, judge.

Geo. H. Williams, for appellants.
John H. Mitchell and Raleigh Stott, for respondent.

BEAN, *C. J.:*

Reversed.

Filed Nov. 19, 1900.

J. J. MURPHY, *Clerk,*
By —— ——, *Deputy.*

339 The Willamette river is wholly within the State of Oregon, and up to and above the city of Portland is navigated regularly by vessels, steamboats and other craft engaged in interstate and foreign commerce. The City of Portland is a municipal corporation, organized by a special act of the legislature, and includes within its boundaries a part of the Willamette river. The defendant Montgomery is the owner of real property within the corporate limits of the city, abutting upon the west side of the river, and is entitled to the rights of a riparian proprietor. The city is given power and authority by its charter (Sess. Laws 1891, p. 805, § 16) "to regulate the building of wharves and the driving of piles in the Willamette and Columbia rivers within the limits of the city, and to establish a line beyond which wharves shall not be built nor piles driven. On the eighteenth of February, 1891, the legislature passed an act creating a municipal corporation, composed of the then cities of Portland, East Portland and Albina (now the consolidated city of Portland) and surrounding territory, by the name and style of The Port of Portland, the object and purpose of which is "to so improve the Willamette river at the cities of Portland, East Portland and Albina, and the Willamette and Columbia rivers between said cities and the sea, as that there shall be made and permanently maintained in said Willamette river at said cities and in the said Willamette and Columbia rivers between said cities and the sea a ship channel of good and sufficient width and having a depth at all points at mean low water both at said cities and between said cities and the sea, of not less than twenty-five feet." Sess. Laws 1891, p. 791. So far as may be necessary or convenient to carry out the objects of its creation, such corporation is given "the full control of said rivers at said cities, and between said cities and the sea, so far and to the full extent that this State can grant the same, and shall be and is hereby authorized to remove such obstructions therefrom, and erect such works therein as may be found necessary
340 or convenient in creating or maintaining the channel as aforesaid." The power and authority given to the Port of

Portland is vested in and exercised by commissioners, who h
been duly appointed and have organized as provided by law.
August 9, 1892, the Secretary of War, pursuant to the provisions
the amendment to section 12 of the river and harbor act of Aug
1888, approved September 19, 1890, established harbor lines in
Willamette river at Portland, and, on December 12, 1892, the
passed "an ordinance establishing a wharf line on the city fro
which conforms to and coincides with the harbor line previou
established by the Secretary of War. By section 3 of said ordina
it is provided that "all wharves or other structures hereafter b
or erected on the river front of the city on the east side of the W
lamette river shall not extend westerly beyond the line as laid do
in section 1 of this ordinance, and all permits hereafter granted
the common council for the driving of piles or erection of structu
shall conform to said line."

On May 21, 1898, the defendant Montgomery, being desirou
constructing a wharf in front of his property, petitioned the Se
tary of War to relocate the harbor line by an extension to an in
section of the lines previously established in front of "Montgom
dock" and in front of the North Pacific Terminal Company's do
thus extending it at the point of intersection of such lines so
eighty-five feet into the river beyond the line previously locat
In support of his petition, he alleged that the harbor line as t
established was too far inland and at many points in water from
inches to two feet deep. The Secretary of War referred the ap
cation to the United States engineer at Portland for rep
with directions that public hearing be had on the quest
as to whether the desired change should be made. After s
hearing, the local engineer reported adversely to the change,
his report, together with the evidence taken at the hearing,
forwarded to the Chief of Engineers at Washing
341 who subsequently transmitted the same with his views to
Secretary of War. On September 23, 1898, the Secret
granted Montgomery's petition, and changed the harbor lines acc
ingly. Montgomery immediately began the construction of a wh
covering some 30,000 square feet of the river outside of the wh
line established by the city, but inside of the harbor line as reloc
by the Secretary of War on September 23, 1898. Thereupon
Port of Portland, at a meeting duly called, November 2, 1
adopted the following preamble and resolution:

"Whereas, the wharf line heretofore, and prior to the 1st da
July, 1898, established by the United States engineers, curtails
navigable waters of the Willamette river at the city of Portlan
the full extent which may be done in the interest of the shipp
interests of this port; and

"Whereas, in order to provide sufficient space and width of ch
nel to accommodate the fast increasing shipping interests of
port it would be necessary to, in the near future, so improve
channel of the said river at Portland and within the limits of
port as to make it twenty-five feet in depth within the entire li
of said port, and from the steel bridge crossing said river in the

of Portland, now used by the various railroads entering the said city of Portland, to the south end of Swan island and to its full width as between said wharf lines so established as aforesaid; and

"Whereas, to allow any wharves to be extended into said river in this port and within the limits of the city of Portland, beyond the wharf line aforesaid, will be of great and lasting damage to this port and to the shipping interests thereof; now, therefore, be it

"Resolved, That the wharf line of this port and at the city of Portland and on both sides of the Willamette river be and the same is hereby established and fixed as the same as that heretofore and prior to the 1st day of July, 1898, established by the United
342 States engineers, until the further action of this port.

"Whereas, one J. B. Montgomery and those in his employ or acting under him is now engaged in or intends to construct a wharf on property owned by him, situate in what was at one time the city of Albina, and extending beyond said wharf line; therefore, be it

"Resolved, That the said J. B. Montgomery and those acting under him be notified to cease the construction of said wharf beyond said wharf line aforesaid, and to at once remove any piling or other obstruction which he may have placed in the river in front of his said property and beyond said wharf line, and that if he shall fail to do so at once that the executive committee be instructed to take such steps as may be necessary, by legal proceedings or otherwise, to secure the object aforesaid."

A copy of such preamble and resolution was served upon Montgomery, together with a notice, signed by the president and secretary of the port of Portland, requiring him to cease driving piles in the river outside of the wharf line established by the city, and to remove any piling or other obstruction which he may have previously placed there. On November 23, 1898, the commissioners of the port of Portland passed the following resolution:

"Whereas, on the 9th day of August, 1892, the United States engineers established a wharf line in the Willamette river within the city of Portland, Oregon; and

"Whereas, said wharf line has been adopted and established by said city and also by the port of Portland; and

"Whereas, J. B. Montgomery is now engaged in the construction of a wharf in said river outside of said line; therefore, be it

"Resolved, By the board of commissioners of the port of Portland, that in our judgment, and we do hereby declare and decide, that the observance of said wharf line in the construction of wharves is necessary for a good and sufficient width of channel in said river within said city, and that the construction of said
343 wharf which said Montgomery proposes to extend eighty-five feet into said river beyond said wharf line, will be an obstruction to our work in making and maintaining said width of channel; and, further, it is our judgment that said wharf when constructed as proposed by said Montgomery will interfere with the navigation of said river by creating shoal places in its now navigable waters, and will interfere with and obstruct our work in making

and maintaining a channel in said river twenty-five feet in depth, as provided for in the act incorporating the Port of Portland."

Montgomery refused to comply with the notice or resolutions of the Port of Portland and continued the construction of the wharf, whereupon this suit was commenced by the City and the Port of Portland November 25, 1898, to enjoin its extension outside of the wharf line established by the city. The complaint, after setting up the incorporation of the City and the Port of Portland, the ordinance establishing the wharf line, and the resolution of the Port of Portland, alleges that Montgomery is engaged in the construction of a wharf outside of the wharf line established by the city, and asks that he be enjoined and restrained from so constructing his wharf. The answer sets out the proceedings before the Secretary of War on Montgomery's application for a relocation of the harbor line in front of his property, and the re-establishment thereof, and avers that the wharf as the same is being constructed will not do any injury or damage whatever to the navigation or commerce of the Willamette river within the limits of the city of Portland, but, on the contrary, will be an improvement to the harbor and an aid to navigation and commerce. A demurrer to that part of the answer setting up the action of the Secretary of War on September 23, 1898, re-establishing or relocating the harbor line, was overruled, and the cause proceeded to trial upon the merits. The court found the facts substantially as above stated, and ruled that the harbor line re-established and relocated by the Secretary of War on September 23, 1898, is the only proper and legal wharf line in front of the defendant's
344 property, and that neither the City of Portland nor the Port of Portland has any jurisdiction or authority to prevent or interfere with the construction of a wharf up to the line so established, and plaintiffs appeal.

BEAN, *C. J.*:

It is not alleged in the complaint that the proposed wharf will be an obstruction to, or in any way interfere with, the navigation of the river, or with any of the powers and duties of the Port of Portland, but such is the necessary inference, *prima facie*, at least, from the resolutions forbidding its construction, the fact that it will extend beyond the wharf line as established by the city, and that its erection is in violation of an ordinance thereof. The defendant's right to construct a wharf in front of his property is subject to the power of the corporate authorities to "prescribe the mode and extent to which the same may be exercised beyond the line of low-water mark:"

> Hill's Ann. Laws Or., § 4228; Charter City of Portland, Sess. Laws 1891, p. 805, § 16; 29 Am. & Eng. Enc. Law, 69; Lewis *v.* City of Portland, 25 Or. 133.

And it will be assumed that the regulations prescribed by the municipal authorities are reasonable and valid until the contrary is made to appear.

The only questions in the case, therefore, are whether the act of

Congress, of September 19, 1890 (26 U. S. St. at Large, 454, 455), authorizing the Secretary of War to establish harbor lines, is valid, and, if so, whether it vests in that officer the power and authority to permit or authorize the construction of wharves up to such lines in navigable waters wholly within a State, notwithstanding the laws of the State prohibit such construction.

Sections 7 and 12 of the act are as follows:

"SEC. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other
345 waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw-bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

"SEC. 12. That section twelve of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and re-enacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall wilfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not
346 exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court for each offense."

The contention for the defendant is that the sections above quoted manifest the purpose of Congress to deprive the several States of all authority to control and regulate the extension of wharves in the

harbors of the United States, although such harbors may be situated wholly within their territory. That full power resides in the State to prescribe the line beyond which piers, docks, wharves and other structures may not be extended into the navigable waters of a harbor, in the absence of the exercise by Congress of authority to the contrary, is not disputed: Cannon *v.* New Orleans, 20 Wall. 577; Packet Co. *v.* Keokuk, 95 U. S. 80; Packet Co. *v.* St. Louis, 100 U. S. 423; Packet Co. *v.* Catlettsburg, 105 U. S. 559; Transportation Co. *v.* Parkersburg, 107 U. S. 692; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; Illinois Central Railroad *v.* Illinois, 146 U. S. 387. But it is asserted that this power in the State is predicated solely upon the failure of Congress to exercise its paramount authority under the commercial clause of the Constitution, and, therefore, the authority of the State no longer obtains since the act of 1890 amounts to express assumption by Congress of entire control over all harbors of the United States, so far as the establishment of harbor lines and the construction of wharves, piers and docks are concerned.

For the plaintiffs it is contended that section 12 above cited is unconstitutional and void, for the reason that it delegates to the Secretary of War powers which are exclusively lodged by the Constitution in Congress. It is admitted that, under the commercial clause of the Constitution, where the navigable waters of a port or river of the United States are accessible from a State other than the one in which they lie, Congress has absolute power over them, so far as to preserve and protect their free navigation, and can
347 declare what may and may not constitute obstructions thereto; but such power, it is argued, can alone be exercised by Congress, and canot be delegated to any other body or agency.

It may be assumed that Congress can confer upon the Secretary of War, or any other agent, the duty of ascertaining whether any given harbor line conflicts with some act of Congress upon the subject, and can require any change or modification thereof that may be needed to conform it thereto; or it may, perhaps, as in the matter of bridges (Miller *v.* Mayor of New York, 109 U. S. 385), prohibit the establishment by local authorities of harbor lines without the approval of the Secretary of War, or some other agency. But this does not meet the question whether Congress can delegate the whole matter to the Secretary of War. The question is important and interesting, and has been the occasion of considerable discussion in the Federal courts, although it has never been adjudicated by the Supreme Court of the United States: United States *v.* Keokuk & H. Bridge Co., 45 Fed. 178; United States *v.* Rider, 50 Fed. 406; United States *v.* City of Moline, 82 Fed. 592; United States *v.* Romard, 89 Fed. 156. The tendency of the decisions, as we read them, supports the argument that the act is void as an unlawful delegation of authority. It does not provide that harbor lines shall be established in the harbors of the United States, leaving to the Secretary of War the mere duty of executing the will of Congress, but it confers upon that officer the right to determine whether such lines shall be established, or not; thus, in effect, vesting in him the

power to say when and under what circumstances the General Government will assume authority over a given harbor. The States have jurisdiction over the navigable waters within their boundaries until Congress assumes authority over them, and it would seem doubtful that Congress can legally confer upon a mere executive officer the power to determine whether the General Government or the State has jurisdiction over a given subject-matter, and especially to establish, alter or change, at his will and pleasure, lines beyond which it shall be unlawful to extend or maintain
348 wharves, piers and landing places in the great commercial cities of the country, when the location or change of a single line might involve the loss of millions of dollars to individuals.

But as we construe the act of 1890, it was not designed to interfere with the power and authority of the several States over the location and construction of wharves, piers and landing places, unless they encroach upon the harbor lines established by the Secretary of War. It is unnecessary, therefore, to decide whether it is void for the reason suggested. It provides that, under certain circumstances, the Secretary of War may establish a line in harbors of the United States beyond which no pier, wharf, etc., shall be extended, except by his permission or under such regulations as may be prescribed from time to time. This is not equivalent, however, to a legislative declaration that they may be extended up to such line regardless of the local laws on the subject. The more reasonable construction is that Congress, in the exercise of its paramount authority under the commercial clause of the Constitution, has authorized the establishment of a line beyond which such structures shall not be extended except by permission of the Secretary of War, but has left to the several States authority to determine whether local interests require that a larger space in the harbor shall be reserved for the use of ships and shipping than that outside of such line. The obvious purpose of the law is to preserve the free navigation of harbors. To that end it provides for the establishment of lines therein, when necessary to their "preservation and protection," outside of which no obstruction shall be permitted without the consent of the Federal Government. Congress has thus assumed jurisdiction over that part of a harbor outside of a line which the Secretary of War may lawfully establish. But it has not, in our opinion, assumed jurisdiction or authority over the space between such line and the shore, nor has it made any provision, directly or indirectly,
349 as to what use shall be made thereof. While wharves, piers and landing places are essential to commerce by water, they are, nevertheless, in their nature local, attached to the soil, and require a diversity of rules and regulations. Full jurisdiction and control over them is vested in the State in the absence of congressional legislation upon the subject; and such legislation cannot, we think, be inferred from mere authority given an executive officer to establish a line in the harbor beyond which it shall be unlawful to extend such structures without his consent. The mere delega-

tion of such an authority does not manifest a purpose to assume jurisdiction over the entire harbor, nor to confer upon such officer the power to give original authority to construct wharves. Nor is the provision of section 7, that it shall not be lawful to build any wharves, etc., outside of an established harbor line without the permission of the Secretary of War, equivalent to a declaration that he has power to authorize the construction of wharves. As it pertains to such structures, his duties are prohibitive in their character, and confined alone to preventing their extension beyond such a line as may be established by him. The initiative in the construction of wharves is with the shore-owner, under such regulations as the State may make, and the duty of the Secretary of War, under the act of Congress, is to see that they do not extend into the harbor beyond a certain line without his permission. So long as the legislation of the State does not interfere with the duties of such officer, or conflict with the line established by him, it is controlling. Now, in this case, there is no conflict. The purpose of the City of Portland is not to interfere with the harbor line relocated by the Secretary of War in September, 1898, but to prohibit the extension of wharves and piers beyond a certain line inside thereof. In our opinion, such power and authority still remain in the State, and Congress has not by the act of 1890 assumed to exercise ex-
350 clusive control over the matter. This conclusion, we think, finds support in Lake Shore & Michigan Railway *v.* Ohio, 165 U. S., 365.

It follows that the decree of the court below must be reversed, and a decree entered here in accordance with this opinion.

351 In the Supreme Court of the State of Oregon.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
vs.
MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, Substituted for James B. Montgomery, Defendant and Respondent.

Petition for Order Granting Writ of Error to the Supreme Court of the United States.

To the Honorable Robert S. Bean, chief justice, and Honorable Frank A. Moore and Honorable Charles E. Wolverton, associate justices, of the Supreme Court of the State of Oregon:

The undersigned, Mary Phelps Montgomery, executrix of the last will and testament of James B. Montgomery, deceased, substituted for James B. Montgomery, defendant and respondent in the above-entitled court, and plaintiff praying writ of error to the Supreme Court of the United States, respectfully prays an order of this honorable court, or of the chief justice, granting a writ of error to the Supreme Court of the United States, in the above-entitled cause, from the final judgement and decree entered herein by this court

on the 19th day of November, 1900, and for the following reasons:

352 1st. Because there was, in the determination and decision of the above-entitled cause, drawn in question by your petitioner the validity of a statute of the State of Oregon, and of an ordinance of the common council of the city of Portland and of an authority exercised under a statute of the State of Oregon and under said ordina-ce, on the ground that they and each of them were and are repugnant to the Constitution of the United States, to wit, that paragraph of section eight of article one, which provides as follows: "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." And also as being repugnant to the twelfth section of the act of Congress, entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors and for other purposes," approved September 19th, 1890, which reads as follows:

"SECTION 12. That section twelve of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and re-enacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall willfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court for each offense." 26 U. S. Statutes, page 455.

And also as being repugnant to section 7 of said act of Congress hereinbefore cited, which reads as follows:

"SEC. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navi-

353 gable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of the channel of said navigable waters of the United States, unless

approved and authorized by the Secretary of War: Provided, that this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw-bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

And because the decision of this honorable court is in this case in favor of the validity of the said statute of the State of Oregon and of said ordinance of the common council of the city of Portland, and of the said authority exercised by the City of Portland under and in pursuance of said statute of the State of Oregon and of said ordinance. Said statute of the State of Oregon hereinbefore referred to being subdivision 16, of section 37, of the act of the legislature of the State of Oregon, entitled "An act to incorporate the City of Portland," which act became operative by being filed in the office of the secretary of state of the State of Oregon, February 19,
354 1891, and which subdivision under the head of "Chapter V," "Of the organization and power of the council" reads as follows:

"16. To regulate the building of wharves, and the driving of piles in the Willamette and Columbia rivers within the limits of the city, and to establish a line beyond which wharves shall not be built nor piles driven" (Session Laws of Oregon, 1891, page 805).

And of the following provisions of an ordinance of the common council of the city of Portland, approved December 12th, 1892 (ordinance No. 7995) entitled "An ordinance establishing a wharf line on the city front," section 1 of which is as follows:

"*Wharf Line—Establishment of.*

"SECTION 1. The wharf line of the river front of the City of Portland is hereby established at, and made to conform to the deep-water line in this section designated, to wit: * * *

"Right bank, going north.

"Commencing on a point on the prolongation westward of the center line of East Madison (T) street which shall be 700 feet from the intersection of said center line with the center of East Water street; thence to a point on the prolongation westward of the center line of East Oak (J) street which shall be 260 feet from the intersection of said center line with the center line of East Water street; thence to a point on the prolongation westward of the center line of East Couch (E) street which shall be 230 feet from the intersection of said center line with the center line of East First street; thence to a point on the prolongation westward on the south side of east Glisan (A) street which shall be 340 feet from the intersection of said south side with the center line of East First street; thence to a point on the axis of the steel railway bridge which shall be 450 feet from the center of the pivot pier of said bridge meas-

ured along the axis in an easterly direction; thence to a point on the prolongation westward of the center line of Knight (Mitchell) street which shall be 557 feet from the intersection
355 of said center line with the center line of Loring street; thence to a point on the prolongation westward of the center line of Randolph (Stark) street which shall be 586 feet from the intersection of said center line with the center line of Loring street; thence to a point on the prolongation westward of the center line of Russell street, which shall be also on the prolongation southward of the outer face of the docks of the North Pacific Terminal Company and 700 feet more or less from the intersection of said center line of Russell street with the center line of Loring street; thence along the outer face of said North Pacific Terminal Company's docks direction N. 39° 45 minutes W., distance 3,120 feet to a point; thence in a direction north 31° 30 minutes W., distance 2,630 feet to a point; thence in a direction N. 26° W., distance 2,000 feet to a point; thence N. 44° W., distance 1,500 feet to a point; thence in a direction N. 53° W., distance 5,280 feet to a point; thence in a direction N. 88° 30 minutes W., distance 400 feet to a point; thence in a direction S. 69° W., distance 800 feet to a point; thence in a direction S. 84° 30 minutes W., distance 500 feet to a point; thence in a direction N. 66° W., distance 1,100 feet to a point; thence in a direction N. 51° 30 minutes W., distance 5,000 feet to a point; thence to a point on the prolongation southwesterly of the south side of Oneonta (Main) street in the town of Saint John which shall be 320 feet from the intersection of said south side with the east side of Front street; thence to a point on the prolongation southwesterly of the center line of Burlington (Washington) street which shall be 240 feet from the intersection of said center line with the east side of Front street; thence to a point on the prolongation westward of the north side of Baltimore (Fanny street) which shall be 430 feet from the intersection of the said north side with the east side of Front street."

And section 3 of said ordinance of the common council of the city of Portland, Oregon, is as follows:

356 "SEC. 3. All wharves or other structures hereafter built or erected on the river front of the city on the east side of the Willamette river shall not extend westerly beyond the line as laid down in section one (1) of this ordinance, and all permits hereafter granted by the common council for the driving of piles or erection of structures shall conform to said line."

And in pursuance of which act of the legislature incorporating the City of Portland, and by said section one (1) of said ordinance, *supra*, the common council of the city of Portland undertook to establish the wharf lines of the Willamette river, and which wharf lines conflict with the harbor lines in the said harbor of the city of Portland in the Willamette river, as established by the Secretary of War, August 9th, 1892, and as re-established and fixed by the Secretary of War, September 23rd, 1898, in pursuance of sections 7 and 12 of the act of Congress of August 11th, 1888, as amended by section 12 of the act of Congress of September 19th, 1890 (26 U. S. Statutes, 455).

And your petitioner respectfully represents and shows to this honorable court that the record in this case will show that in pursuance of the provisions of said sections 7 and 12 of the act of Congress aforesaid, James B. Montgomery did on May 21, 1898, (Abstract of Record 35) make application to the Secretary of War for an order permitting him to extend his wharf a certain clearly defined and accurately described distance in length and width *outside* the harbor line established by the Secretary of War, August 19, 1892 (Abstract of Record 31), and also praying that the harbor line thus established be relocated and re-established on a certain line, also clearly defined and designated in such application (Abstract of Record 35). That subsequently on September 23rd, 1898, said application of the respondent, Montgomery, was in all respects granted by the then acting Secretary of War, G. W. Meiklejohn by the following endorsement on said application:

"9th indorsement.

WAR DEPARTMENT, *September* 23, 1898.

In accordance with the views of the Chief of Engineers, the request of Mr. James B. Montgomery will be complied with.

(Signed) G. D. MEIKLEJOHN,
Acting Secretary of War."

And also on the same date said acting Secretary of War made the following endorsement upon the map accompanying and a part of such application, to wit;

"WAR DEPARTMENT, *September* 23, 1898.

The change in harbor lines shown in red hereon is approved.

(Signed) G. D. MEIKLEJOHN,
Acting Secretary of War."

(See findings of fact, Abstract 41–42.)

By these two orders of the Secretary of War, therefore, it is respectfully represented that both of the things prayed for by James B. Montgomery were granted, namely, first, permission to construct his wharf in part outside of the harbor lines established August 9, 1892, and, second, the harbor line was relocated and re-established in front of the property of the respondent Montgomery on the line as prayed for in his application (findings of fact, Abstract 42–43).

The record further shows in this case that the respondent James B. Montgomery, constructed his wharf wholly inside of the harbor line thus established by the Secretary of War, and in accordance with the permission given him by the Secretary of War. Respondent, therefore, now praying for writ of error, claims that in pursuance of said provision of the Constitution of the United States hereinbefore cited, and of said acts of Congress, and of the authority exercised under the United States by the said Secretary of War, hereinbefore cited, said James B. Montgomery had the right and privilege to construct his wharf precisely at the point and places

the same is constructed as shown by the records in this case; and inasmuch as the decision of this honorable court in this case is against the right and privilege of James B. Montgomery to
358 construct and erect his wharf at the places and points as located, that, therefore, the Federal question is involved, and in the decision aforesaid there is error to the prejudice of the respondent and your petitioner.

359 Your petitioner avers that said act of the legislature of the State of Oregon, *supra*, and said ordinance of the city of Portland, *supra*, are each repugnant, first, to the provision of the Constitution of the United States hereinbefore cited; second, to the provisions of the acts of Congress hereinbefore cited, and third, that the act of the legislature of the State of Oregon, approved February 18, 1891, entitled "An act establishing and incorporating the Port of Portland and to provide for the improvement of the Willamette and Columbia rivers in said port, and between said port and the sea," and which act is cited and in part set out in the bill of complaint in this case, and under and in pursuance of which the plaintiff in this court claimed certain rights, is in conflict with and is repugnant to the provision of the Constitution of the United States hereinbefore cited, and also is in conflict with and repugnant to the provisions of the acts of Congress hereinbefore cited. And your honorable court in deciding this cause, decided in favor of the validity, first, of each of said acts of the legislature of the State of Oregon hereinbefore cited, and, second, in favor of the validity of said ordinance of the common council of the city of Portland hereinbefore cited, and held that neither of said acts of the legislature of the State of Oregon nor said ordinance of the common council of the city of Portland was repugnant either to the provisions of the Constitution of the United States hereinbefore cited, or to the provisions of the acts of Congress hereinbefore cited, and in which decision there was error upon the part of this honorable court to the prejudice of the defendant and your petitioner.

360 2nd. Because your petitioner as respondent in this court in this cause claimed the right and privilege under the clause of the Constitution of the United States hereinbefore cited, and under the provisions of the acts of Congress hereinbefore cited, and under the action of the Secretary of War thereunder in establishing the harbor lines of the Willamette river in the harbor of the city of Portland, and in authorizing James B. Montgomery to extend his wharf out beyond the harbor line originally established to the harbor line as re-established by the action of the Secretary of War on the 23d day of September, 1898, to construct the wharf in question at the points and places where it is constructed, and that your petitioner should be protected in such right and privilege by said provision of the Constitution of the United States hereinbefore cited and by said provisions of the acts of Congress hereinbefore cited and by the action of the Secretary of War thereunder as hereinbefore cited, and because this court in its said decision has decided against the right and privilege of the defendant, your pe

titioner, to construct said wharf at the points and places it is constructed, and in each of said Federal questions so involved in the trial and decision of said cause, there has been error to the prejudice of the rights of your petitioner.

Wherefore, your petitioner prays an order, allowing a writ of error in the above-entitled cause, and she will ever pray.

STOTT, BOISE & STOTT &
MITCHELL & TANNER,
Attorneys for Mary Phelps Montgomery, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, Substituted for James B. Montgomery.

361 [Endorsed:] No.—. In the supreme court of the State of Oregon. The City of Portland and The Port of Portland, appellants & plaintiff-, *vs.* Mary Phelps Montgomery, executrix, etc., respondent and defendant. Petition for writ of error. Filed Jan'y 17th, 1901. J. J. Murphy, clerk, by —— ——, deputy. Stott, Boise & Stout and Mitchell & Tanner, attorneys for respondent.

362 In the Supreme Court of the State of Oregon.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
vs.
MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, Substituted for James B. Montgomery, Defendant and Respondent.

Undertaking on Writ of Error to the Supreme Court of the United States.

KNOW all men by these presents: That we, Mary Phelps Montgomery, executrix of the last will and testament of James B. Montgomery, deceased, the plaintiff in error in the above-entitled cause on writ of error to the Supreme Court of the United States, as principal, and Walter F. Burrell and David P. Thompson both of the city of Portland, county of Multnomah and State of Oregon, as sureties, are held and firmly bound unto The City of Portland and The Port of Portland, plaintiffs and appellants in the supreme court of the State of Oregon and respondents on writ of error in the Supreme Court of the United States, in the full sum of five hundred dollars ($500.00) to be paid to the said City of Portland and the Port of Portland, or their successors, to which payment well and truly to be made and done we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, and the successor also of the said Mary Phelps Montgomery, executrix aforesaid, firmly by these presents.

Sealed with our seals and dated at Portland, Oregon, this
363 seventeenth day of January, A. D. nineteen hundred and one (1901).

Whereas, the above-named Mary Phelps Montgomery, executrix of the last will and testament of James B. Montgomery, deceased,

has sued out a writ of error in the above-entitled cause to the Supreme Court of the United States to reverse the judgement and decree in the above-entitled cause by the supreme court of the State of Oregon,

Now, therefore, the condition of this obligation is such, that if the above-named Mary Phelps Montgomery, executrix of the last will and testament of James B. Montgomery, deceased, plaintiff in error herein, shall prosecute said writ of error to effect, and answer all costs and damages if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MARY PHELPS MONTGOMERY,
Executrix of the Last Will of James B. Montgomery, Deceased,
By MITCHELL & TANNER, *Her Att'ys.* [SEAL.]
D. P. THOMPSON. [SEAL.]
WALTER F. BURRELL. [SEAL.]

Signed, sealed and delivered in the presence of:
A. H. TANNER.
H. C. ROBERTSON.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, Walter F. Burrell and I, David P. Thompson, being first duly sworn, say: That I am one of the sureties in the foregoing bond; that I am a resident and householder within said district and within the State of Oregon, and that I am worth in property situated therein the sum of one thousand dollars ($1,000.00) over and above all my just debts and liabilities and exclusive of property exempt from execution.

WALTER F. BURRELL.
D. P. THOMPSON.

Subscribed and sworn to before me this 17th day of January, 1901.

[Seal of Harry C. Robertson, Notary Public, State of Oregon.]

H. C. ROBERTSON,
Notary Public for Oregon.

Approved, January 19th, 1901.
R. S. BEAN,
Chief Justice of Oregon.

364 STATE OF OREGON, } ss:
County of Multnomah, }

Due and legal service of the foregoing undertaking by duly certified copy thereof as required by law is hereby admitted and accepted at Portland, Oregon this 18th day of Jan'y 1901.

WILLIAMS, WOOD & LINTHICUM,
Of Attorney- for Appellants, The City of Portland and The Port of Portland.

365 [Endorsed:] No. —. In the supreme court of the State of Oregon. The City of Portland and The Port of Portland, appellants and plaintiffs, *vs.* Mary Phelps Montgomery, executrix, etc., respondent and defendant. Undertaking. Filed Jan'y 19th, 1901. J. J. Murphy, clerk, by —— ——, deputy. Stott, Boise & Stout and Mitchell & Tanner, attorneys for respondent.

366 In the Supreme Court of the State of Oregon.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants,
vs.
MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, Substituted for James B. Montgomery, Defendant and Respondent. } Citation.

UNITED STATES OF AMERICA, *District of Oregon*, } *ss.:*

To The City of Portland and The Port of Portland, plaintiffs and appellants in this court and defendants in error on writ of error to the Supreme Court of the United States, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Oregon, wherein Mary Phelps Montgomery, executrix of the last will and testament of James B. Montgomery, deceased, substituted for James B. Montgomery, is plaintiff in error, and you and each of you are defendants in error, to show cause, if any there be, why the judgement and decree in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Salem, Oregon, this 17th day of January, 1901.

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

367 STATE OF OREGON, *County of Multnomah*, } *ss.:*

Due and legal service of the foregoing citation by duly certified copy thereof as required by law is hereby admitted and accepted at Portland, Oregon, this 18th day of Jan'y 1901.

WILLIAMS, WOOD & LINTHICUM,
Of Attorney- for Appellants, The City of Portland & The Port of Portland.

368 [Endorsed:] No. —. In the supreme court of the State of Oregon. The City of Portland and The Port of Portland, appellants and plaintiffs, *vs.* Mary Phelps Montgomery, executrix, etc., respondent and defendant. Citation. Filed Jan'y 17th 1901. J. J. Murphy clerk, by —— ——, deputy. Stott, Boise & Stout, and Mitchell & Tanner, attorneys for respondent. Filed Jan'y 19, 1901. J. J. Murphy clerk.

369 In the Supreme Court of the State of Oregon.

The City of Portland and The Port of Portland, Plaintiffs and Appellants, *vs.* Mary Phelps Montgomery, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, Substituted for James B. Montgomery, Defendant and Respondent.	Assignment of Errors.

Assignment of Errors on Writ of Error to the Supreme Court of the United States.

Now at this time comes Mary Phelps Montgomery, executrix of the last will and testament of James B. Montgomery, deceased, substituted for James B. Montgomery, defendant and respondent in the above-entitled case, and plaintiff in error to the Supreme Court of the United States, by her attorneys Stott, Boise and Stout and Mitchell & Tanner, and presents the following assignment of errors and prayer for reversal, of the decision in the above-entitled case in this court, by the Supreme Court of the United States:

First. The supreme court of the State of Oregon erred in holding that there was error in the decision and record of the court below, and in reversing the decree of said circuit court.

Second. The supreme court of the State of Oregon erred in holding that the wharf lines established by the appellant, The City of Portland, on the 12th day of December, 1892, were then and ever since have been the legal and authorized wharf lines of the Port of Portland.

370 Third. The court erred in holding that the respondent had no right to drive piles or extend his wharf beyond the wharf line so held to have been established by the appellant the said City of Portland.

Fourth. The court erred in holding that the respondent, her attorneys, agents, servants and employees should be enjoined and restrained from driving piles or putting any structure in said river outside of said wharf lines, with a view to the construction of said or any wharf, and in holding that the appellants should have a decree directing and commanding respondent, her agents, servants and employees, to remove all said piles driven or structures of any description made or put therein outside of said wharf lines in the construction of said wharf.

Fifth. The court erred in holding and decreeing that the respondent, her agents, servants and employees, should be enjoined and restrained from driving piles or putting any other structures in said river outside of said wharf lines with a view to the construction of said wharf, and in directing and commanding respondent, her agents, servants and employees to remove from said river all piles driven or structures of any description made or put in said river outside of said wharf lines in the construction of said wharf.

Sixth. The court erred in holding that the act of the legislature of the State of Oregon, and the 37th section of the 16th subdivision thereof, to wit, an act entitled "An act to incorporate the City of Portland" which act became operative by being filed in the office of the secretary of state of the State of Oregon, February 19th, 1891, and which subdivision under the head of "Chapter V,"
371 "Of the organization and power of the council" reads as follows:

"16. To regulate the building of wharves and the driving of piles in the Willamette and Columbia rivers within the limits of the city, and to establish a line beyond which wharves shall not be built nor piles driven" (Session Laws of 1891, page 805), was not repugnant, as claimed by the respondent Montgomery, to that paragraph of section eight of article one of the Constitution of the United States, which provides as follows: "To regulate commerce with foreign nations and among the several States and with the Indian tribes;" and said court erred in holding that said statute of the State of Oregon was not repugnant to the twelfth section of the act of Congress entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors and for other purposes," approved September 19, 1890, as claimed by respondent Montgomery; and said court erred in holding that said act of the legislature, hereinbefore referred to, was not repugnant, as claimed by the respondent Montgomery, to the seventh section of said act of Congress hereinbefore referred to, and said court erred in holding that the right and privilege, claimed by the respondent Montgomery, to construct his wharf at the place and where it is constructed, in virtue of said provision of the Constitution of the United States and of said act of Congress hereinbefore described, and of the act of the Secretary of War in establishing harbor lines and in re-establishing the same in the harbor of the city of Portland, Oregon, and in granting to the respondent Montgomery the privilege to extend his wharf beyond the harbor line as originally established, was not a valid claim or privilege upon the part of the respondent; and that the same involve Federal questions, and the decision of all of which by this court *were* against respondent and to her prejudice.

372 Seventh. The court erred in holding that the ordinance of the common council of the city of Portland, approved December 12th, 1892 (ordinance No. 7995) entitled "An ordinance establishing a wharf line on the city front" and sections one and three thereof were not repugnant to the clause of the Constitution of the United States hereinbefore cited and to sections seven and

ve of the act of Congress hereinbefore cited and to the author-
f the Secretary of War exercised thereunder establishing harbor
s, as claimed by respondent in this case.

ighth. The court erred in holding that the act of the legislature
he State of Orego, entitled "An act establishing and incorporat-
the Port of Portland and to provide for the improvement of the
lamette and Columbia rivers in said port and between said port
the sea," approved February 18th, 1891, (Session Laws of 1891,
e 791) and which act is cited and in part set out in the bill of
plaint in this case, and under and in pursuance of which the
ellant in this court claimed certain rights, was not in conflict
h and repugnant to the provision of the Constitution of the
ited States hereinbefore cited, and in holding that it was not in
flict with and repugnant to the provisions of the act of Congress
einbefore cited, and in holding that it was not in conflict with
l repugnant to the authority exercised by the Secretary of War,
ler said clause of the Constitution of the United States and said
of Congress, in establishing the harbor lines in the Willamette
er in the harbor in the city of Portland, Oregon.

Ninth. The court erred in holding that the respondent Montgom-
did not have the right to construct his wharf at the place and
the manner he was constructing the same at the commencement
this suit, and at the place and in the manner in which he admits
he was constructing the same in the answer filed in this suit.

3 Tenth. The court erred in holding that the defendant
should pay the costs of this appeal.

Wherefore, respondent prays, for the reasons hereinbefore as-
ned, that this case be reversed, and the decree of the circuit court
irmed.

STOTT, BOISE & STOTT &
MITCHELL & TANNER,
Attorneys for Respondent and Plaintiff in Error.

4 [Endorsed:] No. —. In the supreme court of the State
of Oregon. The City of Portland and Port of Portland, ap-
llants & plaintiffs, *vs.* Mary Phelps Montgomery, executrix, etc.,
spondent and defendant. Assignment of errors. Filed Jan'y
th, 1901. J. J. Murphy, clerk, by —— ——, deputy. Stott, Boise
Stout and Mitchell & Tanner, attorneys for respondent.

375 In the Supreme Court of the United States.

THE CITY OF PORTLAND and THE PORT OF Portland, Plaintiffs and Appellants in the Court Below, Defendants in Error,
vs.
MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, Substituted for James B. Montgomery, Defendant and Respondent in the Court Below, Plaintiff in Error.
No. —. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Oregon and to said supreme court, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in said supreme court before the Honorable Robert S. Bean, chief justice, Honorable Frank A. Moore, associate justice, and Honorable Charles E. Wolverton, associate justice, or one of you, being the highest court of law or equity in the said State in which a decision could be had in said suit between The City of Portland and The Port of Portland, plaintiffs and appellants, and defendants in error, and Mary Phelps Montgomery, executrix of the last will and testament of James B. Montgomery, deceased, substituted for James B. Montgomery, defendant and respondent in the court below, and plaintiff in error, wherein was
drawn in question the validity of a treaty or statute of, or
376 authority exercised under, the United States, and the decision was against their validity; and wherein there was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, and statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said plaintiff in error as by complaint doth appear: and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment or decree be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. nineteen hundred and one, in the said Supreme Court to be then and there held; that

e record and proceedings aforesaid being then and there inspected
e said Supreme Court may cause further to be done therein to
rrect that error what of right, and according to the laws and
stoms of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the
preme Court of the United States, this 16th day of January, in the
ar of our Lord, one thousand nine hundred and one.

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the Circuit Court of the United States
for the District of Oregon.

Allowed.

R. S. BEAN,
Chief Justice of the Supreme Court
of the State of Oregon.

77 STATE OF OREGON, } ss.
County of Multnomah, }

Due and legal service of the foregoing writ of error by duly certi-
ed copy thereof as required by law is hereby admitted and accepted
t Portland, Oregon, this 18th day of January, 1901.

WILLIAMS, WOOD & LINTHICUM,
Of Attorneys for Defendants in Error, The City of
Portland and The Port of Portland.

TATE OF OREGON, } ss:
County of Multnomah, }

Due and legal service of the foregoing writ of error by duly certi-
ied copy thereof as required by law is hereby admitted and accepted
t Salem, Oregon, this 17th day of January, 1901.

J. J. MURPHY,
Clerk of the Supreme Court of Oregon.

78 [Endorsed:] No. — In the Supreme Court of the United States. The City of Portland and The Port of Portland, de-
endants in error, *vs.* Mary Phelps Montgomery, executrix, etc.,
laintiff in error. Writ of error. Filed Jan'y 19th, 1901. J. J.
Murphy, clerk, by —— ——, deputy. Stott, Boise & Stout and
Mitchell & Tanner, attorneys for plaintiff in error.

379 In the Supreme Court of the State of Oregon.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants in the Court Below, Defendants in Error,

vs.

MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, Substituted for James B. Montgomery, Defendant and Respondent in the Court Below, Plaintiff in Error.

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and correct copy of the record of said suit, certified to and filed with our said court as the transcript on appeal from the decree of the circuit court of the State of Oregon for the county of Multnomah, from which the said appeal was taken, and is the record and transcript, together with the abstract of record and briefs, upon which said appeal was heard and the decree of our supreme court entered thereon on the 19th day of November, 1900.

I further certify that the foregoing transcript likewise contains a full, true and correct copy of the decree of our said supreme court upon the said appeal entered on the said 19th day of November, 1900, and a full, true and correct copy of the opinion of the court filed and upon which said decree was entered.

I further certify that the petition for the writ of error in said cause and the endorsements thereon; the bond thereon and the endorsements thereon; the citation and proof of service endorsed thereon; the assignment of errors, order allowing writ of error, and writ of error together with the endorsements thereon, all of which are attached to the above and foregoing, are the original petition, bond, citation, assignment of errors, order allowing writ of error, and writ, lodged with and now in my office; and I further certify

380 that the above and foregoing are such original papers so lodged and filed with me, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed, and of the proceedings had in the above-entitled cause in our said court as the same appear of record and on file in my office.

I further certify that herewith, in pursuance of the stipulation of the attorneys of the respective parties this day filed with me in the supreme court of the State of Oregon, I transmit herewith all the original stipulations, maps, affidavits and other original papers used as evidence in the trial of the above-entitled cause, such original papers being themselves fully described in the stipulation hereinbefore referred to, and the original of which is herewith transmitted, and filed as aforesaid with me on this date; and I certify that all such original papers, maps, and other evidence, are the original papers, maps and other evidence used on the trial of this cause in the supreme court of the State of Oregon.

I further certify that the cost of the foregoing return to writ of error is $18.00, and that said amount was paid by John H. Mitchell for the plaintiff in error.

In witness whereof, I have hereunto set my hand and the seal of the supreme court of the State of Oregon, at my office in the city of Salem, in said State, this — day of February, 1901.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

381 In the Supreme Court of the State of Oregon.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs and Appellants, Defendants in Error,
vs.
MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, Substituted for James B. Montgomery, Defendant and Respondent, Plaintiff in Error.

Stipulation in Reference to Transcript and Papers for the Supreme Court of the United States.

It is hereby stipulated and agreed by and between the attorneys of the respective parties, plaintiffs in error and defendants in error, that the following original papers in addition to the regular transcript of the record, required by law, shall be forwarded to the clerk of the Supreme Court of the United States by the clerk of the supreme court of the State of Oregon, and all of which original papers shall be considered in the argument and decision of this cause in the Supreme Court of the United States, to wit;

First. The original stipulation, signed by the attorneys of the respective parties and dated March 3rd, 1899, including *the printed document marked Exhibit "A" attached thereto and entitled "Appellant's abstract of record,"* and also the original map marked "Exhibit B" attached to and made a part of the answer of the defendant Montgomery, together with the endorsements thereon and certificates attached thereto, and which original map is attached to said stipulation, and which stipulation was filed in the su-
382 preme court of the State of Oregon, March 4, 1899, and all of which were transmitted to the supreme court of the State of Oregon to be considered on the trial of this cause.

Second. The original map entitled "Harbor line, Portland, Oregon, Randolph street to Russell street, survey August 6–13, 1898," which map was used as evidence on the trial of this cause and is now on file with the clerk of the supreme court of the State of Oregon.

Third. The annual report of Engineer Handbury, filed in the supreme court of the State of Oregon on March 4, 1899.

Fourth. The affidavit of John McCraken, dated December 16, 1898, and filed in the supreme court of the State of Oregon on March 4th, 1899.

Fifth. The certified copies of papers of John M. Wilson, brigadier general, Chief Engineer, U. S. A., filed in the supreme court of the State of Oregon, March 4th, 1899.

Sixth. The affidavit of James B. Montgomery, made December 15th, 1898, and filed in the supreme court of the State of Oregon March 4, 1899.

Seventh. The stipulation signed by the attorneys of the respective parties, filed in the circuit court December 17th, 1898, and in the supreme court March 4th, 1899, to the effect that the local engineer at Portland, Oregon, after hearing had, reported against Montgomery.

Eighth. The six letters dates respectively June 2nd, 1898, August 17th, 1898, August 2nd, 1898, September 22nd, 1898, October 7th, 1898, and November 28th, 1898, all attached together and filed in the circuit court on February 1st, 1899, and in the supreme court March 4th, 1899.

Ninth. The stipulation signed by the attorneys of the respective parties, filed in the circuit court December 9, 1898, and in the supreme court, March 4th, 1899, and to the effect that the preamble and resolutions set out in subdivision VII of the bill of complaint,
were on November 2nd, 1898, by the board of commissioners
383 of the port of Portland adopted by said board.

STOTT, BOISE & STOTT &
MITCHELL & TANNER,
Att'ys for Plaintiff in Error.
GEO. H. WILLIAMS,
Of Counsel for The City of Portland &
The Port of Portland.

384 [Endorsed:] No. — In the supreme court of the State of Oregon The City of Portland and The Port of Portland, appellants and plaintiffs, *vs.* Mary Phelps Montgomery, executrix, etc., respondent and defendant Stipulation Filed Feb'y 7, 1901. J. J. Murphy clerk, by —— —— deputy. Stott, Boise & Stout and Mitchell & Tanner, attorneys for respondent.

385 [Endorsed:] No. —. In the supreme court of the State of Oregon. October term, 1900. The City of Portland *et al.*, appellants, *vs.* James B. Montgomery, respondent. Transcript Filed —— —, 1— —— —— clerk.

Endorsed on cover: File No. 18,054. Oregon supreme court. Term No. 253. Mary Phelps Montgomery, executrix of the last will & testament of James B. Montgomery, deceased, plaintiff in error, *vs.* The City of Portland and The Port of Portland. Filed February 16th, 1901.

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 253.

MARY PHELPS MONTGOMERY, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES B. MONTGOMERY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE CITY OF PORTLAND AND THE PORT OF PORTLAND.

Copies of Original Exhibits Sent Up with Transcript of Record and Referred to in Stipulation on Page 191 of Printed Record.

* * * * * * *

Survey of Columbia river, from the mouth of Willamette river to the upper limits of the city of Vancouver, Washington, with a view of establishing a ship channel.

UNITED STATES ENGINEER OFFICE,
PORTLAND, OREGON, *October* 29, 1891.

GENERAL: The river and harbor act approved September 19, 1890, provides that an examination and survey be made with an estimate of the cost of improvement of the—

Columbia river, from the mouth of the Willamette river to the upper limits of the city of Vancouver, with a view to establishing a ship channel.

This duty having been assigned to me by your letter of October 21, 1890, and being now completed, I have the honor to submit the following report:

The city of Vancouver, Wash., is located upon the right bank of the Columbia river, 103 miles above its mouth, and 5 miles above

the mouth of the Willamette river. There is now practically a twenty-foot channel throughout this distance until a point 2½ miles above the mouth of the Willamette is reached, where the water suddenly shoals to 9 feet. Passing this shoal, which is about 3,600 feet wide at its narrowest part, a channel of 20 feet depth or more is again found and can be carried above the limits of Vancouver. This shoal is evidently caused by the withdrawal from this portion of the river of the large proportion of its water which passes behind Hayden island. The upper end of this island is opposite Vancouver. It has a length of 4¼ miles and a width of 2,500 feet at its widest part, with an average width of about 1,800 feet. Its top is about 18 feet above low water, and is covered during the high stages. The bottom lands in this vicinity on the Oregon side, and also on the Washington side below Vancouver, are also covered during these stages. The low-water discharge of the Columbia river at this point is approximately 77,000 cubic feet per second. Of this amount 28,000 cubic feet pass behind Hayden island, and 49,000 down the main channel. These amounts are the results of rough observations, and may be changed by more carefully collected data. They are sufficiently near correct, however, for the purpose of this report. The extreme high water of 1876 reached a level of 30 feet above the low-water datum. We have no data regarding the quantity discharged at that stage. The area of a low-water section across the head of the slough behind Hayden island is 25,000 square feet, and that of a section of the main river at its widest place between Vancouver and the mouth of the Willamette is 38,460 square feet. Immediately above the head of the slough the river has a low-water width of 3,400 feet, with a channel 1,000 feet wide and a depth varying from 20 to 30 feet. Where the slough again joins the main river at the foot of Hayden island we find the same width between banks with two channels, one 800 feet wide with depths over 63 feet, the other 1,000 feet wide, with depths from 20 to 23 feet. The widest distance between banks on the north side of the island where the difficulties to navigation are experienced is 3,200 feet. In this locality there is a sand bar extending out from the right bank and occupying the middle of the river down as far as the foot of Hayden island. Portions of this are bare at low water, and on other portions the depths vary from zero to 9 and 10 feet. This is evidently caused by the diminution in velocity and volume of water, due to that which passes behind the island during the low and medium stages of the river. The sections above the head of the chute and below the foot of the island show that if the low-water discharge of the chute, which is 36 per cent. of the total discharge of the river, can be restored to the main channel, there must necessarily be an improvement in the navigable capacity of this channel. Should the slough be closed to a level with the top of the island, the main channel would eventually be scoured out to a section something like what is found below the foot of the island. There is no necessity for this, however, as the channel depth here is excessive.

As a means of obtaining the necessary depth of water over this obstruction for deep sea-going vessels I recommend that the chute

behind Hayden island be closed by a dam having a height of 4 feet above low water; this dam to be built of piles, brush and rock; to have a width of 6 feet at the top and a base from 25 to 30 feet in width in the deepest water.

The length of the dam will be 3,000 feet. The banks at the two ends should be protected for a distance of 250 feet against erosion at high water; this can be done with a layer of fascines 9 inches thick, covered with rock to a depth of 18 inches.

I estimate that the cost of this work will be approximately as follows, viz:

3,000 feet dam, at $9.33	$28,000
500 feet bank protection, 50 feet wide, at $4	2,000
	30,000
Add 10 per cent. for contingencies	3,000
	33,000

This amount should be made available at one time, so that the work when once commenced may be pushed to completion.

I send herewith a tracing* from the map which it was necessary to make in order to properly prepare this project. On this is shown the proposed location of the dam and also a section showing the manner of assembling the material. The piles are to be 6 feet apart and each driven opposite an interval in the other row.

Just where the best water will be in the main channel after the dam has produced its results will be difficult to predict. Examining the map it will be observed that there is a decided tendency for the channel, after leaving the bridge site, to cross over to the north shore of Hayden island. At the foot of the island this channel shoals up to 5 to 6 feet for a short distance. This shoal will doubtless be washed away. Vessels now going to Vancouver usually keep close along up by the Washington shore. Arriving within about a mile and a half of the town they encounter a shoal place where 9 feet at low water is the most that can be carried for a distance of about 800 yards. The indications are that this is soft material that will be easily eroded. The increase of current and volume of water that will result from the closing of the chute will undoubtedly increase the depth of water in this locality. Whether the best water will be found on this shore or the Hayden Island shore cannot now be predicted.

To obtain a temporary 18-foot low-water channel 150 feet wide along this shore by dredging would require the removal of 250,000 cubic yards of material. This at 20 cents per yard would cost $50,000. The same channel can be made by dredging along the Hayden Island shore to the extent of 150,000 cubic yards, which will cost $30,000; a temporary channel, 14 feet deep, can be obtained along this shore by dredging 50,000 cubic yards, at a cost of about

*Not reprinted; printed in House Ex. Doc. No. 36, Fifty-second Congress, first session.

$12,500. Any dredging that may be done before the chute is closed will only give a temporary relief, and it may be expected that the next high water of the river will fill up the dredged cut. After the dam has been built and one high water experienced it will be advisable to resurvey the river and note the effect. This will reveal the locality where dredging, if any be necessary, can be done to the best advantage.

The commerce passing this part of the Columbia river during the year ending June 30, 1891, is reported to be: Passengers, 309,412; grain, 1,221 tons; lumber, 2,476,619 feet; B. M.; live stock, 2,930 tons; general merchandise, 30,773 tons. The finishing of the railroad bridge over the Columbia river at Vancouver and the connection of this point with other parts of the country by rail should eventually make it a port of some importance to sea-going vessels. The only obstruction to their reaching the place now is the bar just below the town, which it is proposed by this project to remove.

Very respectfully, your obedient servant,

THOS. H. HANDBURY,
Major, Corps of Engineers.

Brig. Gen. Thomas L. Casey, Chief of Engineers, U. S. A.

(Through Col. G. H. Mendell, corps of engineers, division engineer, Pacific division.)

(First indorsement.)

U. S. ENGINEER OFFICE,
SAN FRANCISCO, CAL., *November* 2, 1891.

Respectfully forwarded, recommended.

G. H. MENDELL,
Colonel, Corps of Engineers, Division Engineer.

* * * * * * *

(Endorsed:) Exhibit City *v.* Montgomery. Filed Dec. 17, 1898. Dan J. Moore, clerk, by Lansing Stout, deputy. Filed Feb. 1st, 1899. Dan J. Moore, clerk, by Lou A. Harlow, deputy. Filed Mar. 4, 1899. J. J. Murphy, clerk, by W. P. Williams, deputy.

In the Circuit Court of the State of Oregon for the County of Multnomah. In Equity.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs,
v.
JAMES B. MONTGOMERY, Defendant.

STATE OF OREGON,
County of Multnomah, } ss:

I, John McCraken, being first duly sworn, say on oath as follows: I am the president of The Port of Portland, a corporation, one of the plaintiffs herein, and have been such president since some time in

the year 1893. From the date of the organization of said corporation until I became president thereof, as aforesaid, I was vice-president thereof; but on account of the inability of the late W. S. Ladd, at that time president of said corporation, to attend to all of the business of his said office, I was practically manager of the business of said corporation. Very soon after the organization of said corporation, Mr. Ladd, as president thereof, communicated with the Secretary of War of the United States, and enclosed to him a copy of the act incorporating said Port of Portland.

He received an answer from said Secretary of War, approving the proposed improvement of said rivers, but expressly stating that the United States was not to be subjected to any liability or expense on account of such improvement. Major Thomas H. Hanbury was at that time, and continued to be until some time in the year —— the engineer in charge of the work which was being done on said Willamette and Columbia rivers. He was succeeded by Major James C. Post and afterwards by Major W. L. Fisk, who ever since has been, and is now, the United States engineer in charge of said rivers. The work done in and upon said rivers by said Port of Portland, in dredging, constructing dikes, and otherwise, was conducted according to plans prepared by said Handbury, while he occupied his said position; and he, as United States engineer, had general supervision of said work, and was consulted by said Port of Portland in regard to any proposed changes, alterations or improvements in or upon said rivers, and gave to said Port of Portland aid and assistance in prosecuting its said work, all under instructions, as he stated, from the Secretary of War of the United States. He also, in his annual reports to the Secretary of War, stated from time to time what improvements had been made in said rivers by said Port of Portland and the amounts of money expended by said corporation for such purposes. And his successors have continued to state in their reports to the Secretary of War the nature and extent of the work done in and upon said rivers by said Port of Portland, and the amounts of money expended therefor by said corporation. The board of commissioners of said corporation has always understood that the improvement of said rivers, as provided for in said act incorporating said corporation, has been fully authorized and approved by said Secretary of War.

JOHN McCRAKEN.

Subscribed and sworn to before me this 16th day of December, 1898.

[SEAL.] ALBERT E. GEBHARDT,
Notary Public for Oregon.

Due service of the within affidavit by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, Dec. 16, 1898.

MITCHELL & TANNER,
Attorneys for Def't.

Endorsed: No. —. In the circuit court of the State of Oregon for the county of Multnomah. Department No. 3. The City o

Portland and The Port of Portland, plaintiffs, *vs.* James B. Montgomery, defendant. Affidavit of John McCraken. Filed Dec. 17th, 1898. Dan. J. Moore, clerk; by Lansing Stout, deputy. Williams, Wood & Linthicum attorneys for pl'ffs. Refiled Feb. 1st, 1899. Dan. J. Moore, clerk; by Lou A. Harlow, deputy. Filed Mar. 4, 1899. J. J. Murphy, clerk; by W. P. Williams, deputy

UNITED STATES OF AMERICA,
WAR DEPARTMENT,
WASHINGTON CITY, *December* 7, 1898.

I hereby certify that the papers hereto attached are true copies of papers on file in the office of the Chief of Engineers, U. S. Army.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

Be it known that John M. Wilson who signed the foregoing certificate, is the Chief of Engineers, U. S. Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this eighth day of December, one thousand eight hundred and ninety-eight.

[SEAL.]

R. A. ALGER,
Secretary of War.

PORTLAND, OREGON, *May 20th*, 1898.

To Capt. W. L. Fisk, U. S. corps of engineers in charge harbor & river improvements.

DEAR SIR: I have to respectfully request that you will forward to the Chief of Engineers, U. S. Army, or to Hon. Secretary of War, as the proper authority, the enclosed petition, and request for a relocation of the wharf line in front of my property in Albina, city of Portland.

Very respectfully, your obedient servant,
JAMES B. MONTGOMERY.

8th indorsement.

OFFICE CHIEF ENGINEERS, U. S. ARMY, *Sept.* 1, 1898.

Respectfully returned to the Secretary of War.

This is a case of an application of Mr. J. B. Montgomery of Portland, Oregon, for a change of the harbor lines at Portland from those ordered by the Secretary of War August 9, 1892, so as to admit of the construction of a dock, the outer limit of the extreme point of which will be about 85 feet in advance of the present harbor line.

The object of Mr. Montgomery, as stated by him, is to avoid the necessity of the expense of dredging about 22,000 cubic yards of hard material.

If the request is granted it will withdraw a little more than one

acre of the harbor room of Portland, Oregon, and will add about two-thirds of an acre to Mr. Montgomery's dock property.

A public hearing upon this subject was held by Major W. L. Fisk, corps of engineers, in Portland on August 5, 1898, at which a number of prominent citizens were present and views were expressed in favor and against granting Mr. Montgomery's request. A number of letters advocating and opposing the change in the harbor lines were presented and are submitted herewith. After a careful consideration of all the facts, Major Fisk sums up the objections of those opposing the change requested by Mr. Montgomery and expresses the opinion that the harbor lines should remain as established by the Secretary of War in 1892.

The objections presented are as follows:

"1st. The projecting angle in the proposed new harbor line would be likely to cause deposits below it, because it would necessarily check the current at that point during high water, the time at which sediment is carried."

I do not concur in the point made in this objection; on the contrary I believe the slight contraction suggested would correspondingly increase the current and scouring force at the locality.

"2d. The reduction of the high-water cross-section by the proposed change would have a slight choking effect on the floods, not of great importance however."

In my opinion the choking effect, if any, would be immaterial.

"3d. The reduction of the harbor area is the important objection as it is in this portion of the river that sea-going vessels anchor before docking and after loading, and are obliged to manœuvre both arriving and departing, and no encroachment upon the already limited harbor area should be permitted in view of the rapidly increasing commerce of this port."

This objection should receive thoughtful consideration; the change if authorized will withdraw something over an acre from the surface area, but the present depth varies from one to fourteen feet, the greater portion showing less than eight feet over what is reported as hard material; it is now available for anchorage for light-draft vessels only, but can be deepened by dredging.

"4th. As to give Mr. Montgomery privileges which others have not asked through a jealous care for the best interests of the port and even at considerable expense to themselves, it hardly seems fair, although the dreding at the place under discussion would probably be in a material harder than in most other localities."

The point made that if this is granted it will be a special privilege not requested by others, is hardly a good one; if others had made similar applications they surely would have expected and demanded courteous consideration of their requests.

"5th. The increase in the area of Mr. Montgomery's wharf brings up the point that if one holder of water-front property is allowed such substantial advantages, others might justly advance similar claims."

This point is important and should be carefully considered; if other parties presented similar requests under similar conditions

they would receive prompt consideration; in this specific case the owner finds the harbor line running across a bed of hard material which has defied the erosive power of the current during freshets; to avoid the expense of removing about 22,000 cubic yards, he asks that the harbor line be thrown forward about 85 feet at one point, running back to its original location at points about 700 feet distant on each side; to comply with his request reduces the distance between harbor lines on opposite side of the river to about 1,000 feet; less than a mile above the river is only 600 feet wide and is spanned by a bridge resting on piers; the slight contraction now asked cannot throttle the freshets or do any material damage.

In an engineering point of view and in the immediate or future interests of commerce I cannot believe that any material damage will result from granting this request.

The application of Mr. Montgomery is backed by such citizens as Mr. Henry Failing, Senator McBride who writes in his own name and that of Representatives Ellis and Tongue, Mr. Raleigh Stott, Mr. W. F. Burrell, Messrs. C. H. and D. Rafferty, Messrs. Inman Poulsen & Co., Wells, Fargo & Co. (by Mr. R. M. Dooley) and Mr. J. M. Strowbridge. Mr. A. L. Mohler, president of the Oregon Railway and Navigation Co. incloses a letter from the chief engineer of the company, who states he can see no objection whatever to granting Mr. Montgomery's request.

The request receives strong opposition from the Portland chamber of commerce through Mr. H. R. Lewis, secretary, from Mr. L. A. Lewis in behalf of Mrs. C. F. Lewis, from Mr. A. F. Wheeler, from Mr. C. E. Ladd, executor of the estate of the late W. S. Ladd; from the Pacific Coast Elevator Co. and from a number of citizens including the firm of Allen & Lewis by L. A. Lewis, Mr. J. McCrachen and others who have signed a protest against changing the harbor lines.

After a careful study of the subject I see no objection to granting this request other than the establishment of a precedent upon which other applications may hereafter be based; this, in my opinion, is an important objection for the consideration of the Secretary of War.

Mr. Montgomery requests that the Secretary of War will not take final action in this matter until he can have an opportunity to be heard before him.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

9th indorsement.

WAR DEPARTMENT, *September* 23, 1898.

In accordance with the views of the Chief of Engineers, the request of Mr. James B. Montgomery will be complied with.

G. D. MEIKLEJOHN,
Acting Secretary of War.

PORTLAND, OREGON, *May 21st*, 1898.

I, James B. Montgomery, owner of water-front property at Albina, ty of Portland, on the east side of the Willamette river, in Mult- omah county, State of Oregon, do respectfully represent that as the harf line or bulkhead and pierhead line is at present established om the prolongation of the center line of Randolph street to the ter face of the wharf of the Northern Pacific Terminal Company, the owner of some of the property adjacent to the said line as tablished, am unable to reach deep water without great expense in redging, would respectfully represent that you cause that portion said wharf line extending from the prolongation of the center line Randolph street to the outer face of the wharf line of the North- n Pacific Terminal Company, to be relocated extending the same deep water. That you will grant this, my request, your peti- oner, as in duty bound, will ever pray.

JAMES B. MONTGOMERY.

To the Hon. Russell A. Alger, Secretary of War.

PORTLAND, OREGON, *August 17th*, 1898.

o Major W. L. Fisk, corps of engineers, in charge of river and harbor improvements, etc.

DEAR SIR: In reply to your letter asking for a definite location f the change in the established wharf line in front of my property Albina, as desired by me, I would state as follows, viz:

I respectfully ask that the established wharf line be relocated ac- ording to the following description;

"The prolongation northward of the present established wharf ne, from the centre line (produced) of Knight street, to the centre ne (produced) of Randolph street, to an intersection of a prolonga- ion southward of the present established wharf line along the face f the Northern Pacific Terminal Company's dock or wharf, from he intersection of said line with the centre line of Russell street produced)."

Very respectfully yours, J. B. MONTGOMERY,
Portland, Or.

Endorsed: Exhibit. City *v.* Montgomery. Filed Dec. 17th, 1898. Dan. J. Moore, clerk, by Lansing Stout, deputy. Refiled Feb. 1st, 899. Dan. J. Moore, clerk; by Lou A. Harlow, deputy. Filed Mar. , 1899. J. J. Murphy, clerk; by W. P. Williams, deputy.

In the Circuit Court of the State of Oregon for the County of Multnomah, Department No. 3.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs,
vs.
JAMES B. MONTGOMERY, Defendant.

STATE OF OREGON,
County of Multnomah, } *ss:*

I, James B. Montgomery, being first duly sworn, do depose and say: That I am the defendant in the above-entitled case; that the delay caused by the restraining order heretofore issued in this case has resulted in great damage to this defendant in a financial way. Among other things this defendant states that he was negotiating and about to consum-ate a loan sufficient to enable him to complete his wharf and build a warehouse, at the time said restraining order was issued; that he was promised money by parties satisfied with the security, which was to be a mortgage on the property in question; on the restraining order being issued the parties offering the money declined to make the loan, and will as I believe continue to decline should an injunction be issued.

JAMES B. MONTGOMERY.

[SEAL.] Subscribed and sworn to before me this 15th day of December, 1898.

H. C. ROBERTSON,
Notary Public for Oregon.

STATE OF OREGON,
County of Multnomah, } *ss:*

Due and legal service of the within and foregoing affidavit is hereby admitted, accepted, and acknowledged this 16th day of December, 1898.

WILLIAMS, WOOD & LINTHICUM,
Attorneys for Plaintiffs.

Endorsed: In the circuit court of the State of Oregon for Multnomah county, department No. 3. The City of Portland and The Port of Portland, plaintiffs, *vs.* James B. Montgomery, defendant. Affidavit. Filed Dec. 17th, 1898. Dan. J. Moore, clerk, by Lansing Stout, deputy. Refiled Feb. 1st, 1899. Dan. J. Moore, clerk; by Lou A. Harlow, deputy. Filed Mar. 4, 1899. J. J. Murphy, clerk; by W. P. Williams, deputy.

In the Circuit Court of the State of Oregon for the County of Multnomah, Department No. 3.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs,
vs.
JAMES B. MONTGOMERY, Defendant.

Stipulation.

It is agreed by the undersigned, attorneys for the defendant, that the petition of the defendant James B. Montgomery to the Secretary of War for change in the harbor lines was referred to Major Fiske, the engineer in charge of the Willamette and Columbia rivers, and that after a hearing of parties on both sides of the question he reported to the Chief of Engineers of the War Department adversely to the application of the defendant, Montgomery.

STOTT, BOISE & STOUT AND
MITCHELL & TANNER,
Attorneys for Defendant.

(Endorsed:) In the circuit court of the State of Oregon for the county of Multnomah, department No. 3. The City of Portland and The Port of Portland, plaintiffs, *vs.* James B. Montgomery, defendant. Stipulation. Filed Dec. 17th, 1898, Dan. J. Moore, clerk; by Lansing Stout, deputy. Refiled Feb. 1st, 1899. Dan. J. Moore, clerk; by Lou A. Harlow, deputy. Filed Mar. 4, 1899. J. J. Murphy, clerk; by W. P. Williams, deputy.

Fortifications at mouth of Columbia river—River and harbor improvements in Oregon.

Captain W. L. Fisk, corps of engineers, U. S. A.

United States engineer office, P. O. drawer 50.

'98 Miscl., 711.

PORTLAND, OREGON, *Oct.* 7, 1898.

Mr. J. B. Montgomery, city.

SIR: I am requested by the Chief of Engineers to advise you that the relocation of the wharf line in the harbor of Portland, Oregon requested in your petition dated May 21, 1898, viz: the extension to an intersection in front of your property of the harbor lines heretofore established in front of the present "Montgomery dock" and in front of the "North Pacific Terminal Co.'s dock," has been approved by the War Department.

Very respectfully,

W. L. FISK,
Major, Corps of Engineers, U. S. A.

Endorsed: Filed Feb. 1st, 1899. Dan. J. Moore, clerk; by Lou A. Harlow, deputy.

'98 Miscl., 567.

United States engineer office, P. O. drawer 50.

PORTLAND, OREGON, *August* 2, 1898.

Mr. J. B. Montgomery, Portland, Oregon.

SIR: Mr. J. B. Montgomery having petitioned the War Department for a relocation in deep water of the harbor line on the east side of the Willamette river from the prolongation of the center line of Randolph street to the outer face of the wharf of the Northern Pacific Terminal Co., the Secretary of War has directed that a public hearing be had upon the subject. In accordance with those instructions the public hearing will be held at the U. S. engineer office, in the Oregonian building, on Friday, the 5th instant, at 10.30 a. m., at which time all who desire will be given an opportunity to present their views in writing and to offer such further verbal explanation as they may deem necessary.

Very respectfully,

W. L. FISK,
Major, Corps of Engineers, U. S. A.

Endorsed: Filed Feb. 1st, 1899. Dan. J. Moore, clerk; by Lou A. Harlow, deputy.

Office of the Chief of Engineers, United States Army.

WASHINGTON, *Nov.* 28, 1898.

Mr. James B. Montgomery, Portland, Oregon.

SIR: Referring to previous correspondence on the subject, I inclose herewith for retention by you an authenticated copy of the map showing changes in the harbor line of Portland harbor, requested by you, and approved by the Secretary of War, September 23, 1898.

Very respectfully, your obedient servant,

A. MACKENZIE,
Acting Chief of Engineers.

26910.

(One inclosure by registered mail.)

Endorsed: Filed, Feb. 1st, 1899. Dan. J. Moore, clerk; by Lou A. Harlow, deputy.

Subject: Change in harbor lines at Portland, Ore.

File No., 4565–32.

WAR DEPARTMENT,
WASHINGTON, *September* 23, 1898.

SIR: Replying to the joint request of yourself and the Hon. Thomas H. Tongue, for early decision in the matter of the application of Mr. James B. Montgomery for a change of the harbor lines at Portland, Oregon, in front of his property at Albina, I beg

to inform you that after a careful consideration of the subject, I have this day directed that the application of Mr. Montgomery be complied with, in accordance with the views of the Chief of Engineers, U. S. Army.

Very respectfully, G. D. MEIKLEJOHN,
Acting Secretary of War.

Hon. William R. Ellis, House of Representatives.

Endorsed: Filed Feb. 1st, 1899, Dan. J. Moore clerk; by Lou A. Harlow, deputy.

PORTLAND, OREGON, *June 2d*, 1898.

Gen. John M. Wilson, Chief of Engineers.

SIR: I respectfully request that you have the wharf line relocated in front of water lots, 1, 2, 3, 4, 5, 6, and 7, that is to say, from a point at the center of Randolph street, and thence northerly for a distance of 694, feet. At present the wharf line makes a slight angle easterly, and places it at many points in water only six inches to 2 feet in depth. It should, in my opinion, run straight in a northerly direction on the 16-ft. curve, with the large ships now running to Portland, some of them carrying over 6,000 tons and drawing 24 feet, it would still require me to excavate from 5,000 to 8,000 cubic yards, a large proportion of it being cemented gravel.

Respectfully, J. B. MONTGOMERY.

Endorsed: Filed Feb. 1st, 1899. Dan. J. Moore, clerk; by Lou. A. Harlow, deputy.

PORTLAND, OREGON, *August 17th*, 1898.

To Major W. L. Fisk, corps of engineers, in charge of river and harbor improvements, etc.

DEAR SIR: In reply to your letter asking for a definite location of the change in the established wharf line in front of my property in Albina, as desired by me, I would state as follows, viz:

I respectfully ask that the established wharf line be relocated according to the following description;

"The prolongation northward of the present established wharf line, from the centre line (produced) of Knight street, to the centre line (produced) of Randolph street, to an intersection of a prolongation southward of the present established wharf line along the face of the Northern Pacific Terminal Company's dock or wharf, from the intersection of said line with the centre line of Russell street (produced)."

Very respectfully yours, J. B. MONTGOMERY.

Filed Feb. 1st, 1899. Dan. J. Moore, clerk; by Lou A. Harlow, deputy.

Filed Mar. 4, 1899. J. J. Murphy, clerk; by W. P. Williams, deputy.

In the Circuit Court of the State of Oregon for Multnomah County.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Plaintiffs,
vs.
JAMES B. MONTGOMERY, Defendant.

Stipulation.

It is hereby stipulated and agreed upon the part of the attorneys for the defendant, James B. Montgomery, that the preamble and resolutions set out under subdivision VII of the bill of complaint, were on the 2d day of November, 1898, by the board of commissioners of the port of Portland, at a meeting duly called and held, duly adopted by said board, in so far as such board had any jurisdiction or power under its charter to adopt the same, as averred in the bill of complaint. We do not admit, however, the truth of any of the statements contained in said preamble and resolutions, but we deny that said plaintiff, The Port of Portland, had any jurisdiction or power under its charter to adopt said preamble and resolutions.

We further admit that the board of commissioners of the port of Portland did on the 23rd day of November, 1898, at a meeting of said board of commissioners duly called and held, duly adopt the preamble and resolution set out under subdivision VIII of the bill of complaint, in so far as the said board had any jurisdiction or power under its charter to adopt the same, but we do not admit the truth of any of the statements contained in said preamble and resolution, and we protest that said plaintiff, The Port of Portland, had no jurisdiction or power under its charter to adopt said preamble and resolution.

STOTT, BOISE & STOUT AND
MITCHELL & TANNER,
Attorneys for Defendant.

(Endorsed :) A. 3886. In the circuit court of the State of Oregon for Multnomah county. The City of Portland and The Port of Portland, plaintiffs, *vs.* James B. Montgomery, defendant. Stipulation. Filed December 9th, 1898. Dan. J. Moore, clerk, by Lansing Stout, deputy. Stott, Boise & Stout and Mitchell & Tanner, attorneys for defendant. Refiled Feb. 1st, 1899. Dan. J. Moore, clerk, by Lou A. Harlow, deputy. Filed March 5, 1899. J. J Murphy, clerk, by W. P. Williams, deputy.

6076

Supreme Court of the United States.

OCTOBER TERM, 1901.

MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of JAMES B. MONTGOMERY, Deceased, Plaintiff in Error,

vs.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Defendants in Error.

No. 253.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

Brief and Argument on the Part of the Plaintiff in Error.

Statement of Case.

This is a suit brought originally in the Circuit Court of the State of Oregon for the County of Multnomah, by the City of Portland and the Port of Portland, plaintiffs, respondents herein, against James B. Montgomery, in his lifetime, as defendant for the purpose of enjoining the defendant Montgomery, his attorneys, agents,

servants, and employees from driving piles or putting any other obstructions in the Willamette River outside of what was alleged to be a certain wharf line theretofore established by the City of Portland, a municipal corporation, with the view to the construction of a wharf, and praying that a decree and order may be made and entered directing and commanding the said Montgomery, his agents, servants, and employees to remove from said Willamette River all piles driven, or structures of any description made or put in said river outside of said alleged wharf lines in the construction of said wharf, and for such other and further relief as is meet with equity and good conscience, and for judgment for costs and disbursements.

The facts upon which this claim for relief is based are to be found in the bill of complaint. (Record, 16–20.)

To this complaint the defendant Montgomery interposed an answer. (Record, 21–30.)

To this answer the plaintiffs interposed a motion to strike out portions of the same (Record, 1–3); and at the same time plaintiffs also interposed a demurrer to that portion of said answer setting up the action of the Secretary of War on the 23d day of September, 1898, for the reason that the same does not state facts sufficient to constitute any defense to this suit. (Record, 32.)

Subsequently, on the 11th day of February, 1899, said Circuit Court made and filed Findings of Fact and Conclusions of Law in said suit as are set out in *hace verbae* (Record, 32–43); and on the same day said Circuit Court, in accordance with the Findings of Fact and Conclusions of Law hereinbefore referred to, ordered, adjudged, and decreed that the bill of complaint of the plaintiffs filed therein by said City of Portland and Port of Portland, be dismissed, and that the defendant, James B. Montgomery, have and recover of and from the

plaintiffs his costs and disbursements to be taxed, and that execution issue therefor. (Record, 43.)

From this decree the plaintiffs in the court below prosecuted an appeal to the Supreme Court of the State of Oregon, and assigned for error the following:

1. The court below erred in overruling appellants' motion to strike out parts of respondent's answer.

2. Said court erred in overruling appellants' demurrer to respondent's answer.

3. Said court erred in holding that section 12 of the act of Congress of 1890 (27 Rev. Statutes, 88) is constitutional.

4. Said court erred in holding that the Secretary of War had any right in 1898 to change harbor lines that were established in 1892.

5. Said court erred in holding that the facts, as they appeared in the pleadings and evidence, gave the Secretary of War or G. D. Meiklejohn any jurisdiction to fix or interfere with the harbor lines within the city of Portland.

6. Said court erred in holding that respondent had any right to drive piles or extend his wharf beyond the wharf line established by the city of Portland.

7. Said court erred in holding that the port of Portland had no right to interfere with or control the driving of piles or the building of a wharf by respondent in the Willamette River.

8. Said court erred in its first conclusion of law in holding that the red line indicated on the map "Exhibit A," was legally established, and is the only proper

or legal harbor line at the point indicated in said conclusion of law.

9. The court erred in its second conclusion of law in each and every particular as therein stated.

10. The court erred in its third conclusion of law in each and every particular as therein stated.

11. The court erred in dismissing appellants' complaint and awarding costs and disbursements against them.

(Record, 44).

On March 3, 1899, it was stipulated by the attorneys for the respective parties that the "Appellants' Abstract of Record" should be considered and treated in the Supreme Court of the State, as the transcript of record in the case, and the filing of any other or further transcript was waived. (Record, 44.)

Subsequently, April 13, 1899, appellants filed in said Supreme Court a brief and argument in support of their various contentions. (Record, 45–62.)

The respondent, James B. Montgomery, having deceased, his executrix, Mary Phelps Montgomery, was substituted upon the record. (Record, —.)

Subsequently, March 4, 1899, appellants filed their "Abstract of Record" in the Supreme Court of the State. (Record, 15–44.)

Subsequently, the defendant Montgomery filed a brief and argument in the Supreme Court of the State of Oregon, in support of the decree of the Circuit Court. (Record, 63–158.)

To this brief and argument the attention of this court is respectfully attracted.

On April 29, 1899, the appellants, by their attorneys,

filed their reply brief upon the part of the appellants. (Record, 158–167.)

The case coming on for hearing in the Supreme Court of the State, said court on the 19th day of November, 1900, rendered a decree therein reversing the decree of the Circuit Court, and holding—

1. That the findings of fact by the court below were substantially correct and supported by the evidence therein, and that the same were adopted as the findings of fact of said Supreme Court, and as conclusions of law therefrom said Supreme Court of the State found as follows:

(1) That the wharf lines established by the appellant, the city of Portland, on the 12th day of December, 1892, were then and ever since have been the legal and authorized wharf lines of the port of Portland.

(2) That the respondent had no right to drive piles or extend his wharf beyond the wharf lines so established by the appellant, the said city of Portland.

(3) That the respondent, her attorneys, agents, servants, and employees, should be enjoined and restrained from driving piles or putting any structure in said river outside of said wharf line with a view to the construction of said, or any wharf, and that the appellants should have a decree directing and commanding respondent, her agents, servants, and employees, to remove all said piles driven, or structures of any kind made or put therein, outside of said wharf lines in the construction of said wharf.

And it was further ordered, adjudged, and decreed by said Supreme Court as follows:

"That the respondent Montgomery, her agents, ser-

vants, and employees, be, and they are hereby, enjoined and restrained from driving piles or putting any other structures in said river outside of said wharf lines, with a view to the construction of said or any wharf, and the said respondent, her agents, servants, and employees are hereby directed and commanded to remove from said river all piles driven, or structures of any description made or put in said river, outside of said wharf lines in the construction of said wharf."

And it was further ordered and decreed by said Supreme Court of the State as follows:

"That the appellants recover of respondent, their costs and disbursements in this court upon the appeal, allowed and taxed at $141.90, and their costs and disbursements in the court below to be there taxed."

And it was further ordered—

"That the cause be remanded to said court below and that a decree be there entered and docketed in accordance herewith."

(Record, 167–168.)

And said Supreme Court of the State also filed an opinion therein on the same day. (Record, 169–176.)

Subsequently, January 17, 1901, the respondent in the court below, and plaintiff in error herein, filed in said Supreme Court of the State of Oregon, a petition for an order granting a writ of error to the Supreme Court of the United States (Record, 176–182), which petition was granted, and also filed her undertaking on writ of error to said Supreme Court of the United States (Record, 182), and citation was duly issued. (Record, 184.)

The appeal having been perfected, the parties plaintiffs and defendant in error by their respective attorneys, entered into a stipulation as follows:

"Stipulation in reference to transcript and papers for the Supreme Court of the United States.

"It is hereby stipulated and agreed by and between the attorneys of the respective parties, plaintiffs in error and defendant in error, that the following original papers in addition to the regular transcript of the record, required by law, shall be forwarded to the clerk of the Supreme Court of the United States by the clerk of the Supreme Court of the State of Oregon, and all of which original papers shall be considered in the argument and decision of this cause in the Supreme Court of the United States, to wit:

FIRST. The original stipulation, signed by the attorneys of the respective parties and dated March 3, 1899, including the printed document marked "Exhibit A" attached thereto, and entitled "Appellants' Abstract of Record" and also the original map marked "Exhibit B" attached to and made a part of the answer of the defendant Montgomery, together with the endorsements thereon and certificates attached thereto, and which original map is attached to said stipulation, and which stipulation was filed in the Supreme Court of the State of Oregon, March 4, 1899, and all of which were transmitted to the Supreme Court of the State of Oregon, to be considered on the trial of this cause.

"SECOND. The original map entitled "Harbor line, Portland, Oregon, Randolph Street to Russell Street, Survey August 6–13, 1898," which map was used as evidence on the trial of this cause and is now on file with the clerk of the Supreme Court of the State of Oregon.

"THIRD. The annual report of Engineer Hanbury, filed in the Supreme Court of the State of Oregon on March 4, 1899.

"FOURTH. The affidavit of John McCraken, dated December 16, 1898, and filed in the Supreme Court of the State of Oregon on March 4, 1899.

"FIFTH. The certified copies of papers of John M. Wilson, Brigadier General, Chief Engineer, U. S. A., filed in the Supreme Court of the State of Oregon, March 4, 1899.

"SIXTH. The affidavit of James B. Montgomery, made December 15, 1898, and filed in the Supreme Court of the State of Oregon March 4, 1899.

"SEVENTH. The stipulation signed by the attorneys of the respective parties, filed in the Circuit Court December 17, 1898, and in the Supreme Court March 4, 1899, to the effect that the local engineer at Portland, Oregon, after hearing had reported against Montgomery.

"EIGHTH. The six letters, dates respectively June 2, 1898, August 17, 1898, August 2, 1898, September 22, 1898, October 7, 1898, and November 28, 1898, all attached together and filed in the Circuit Court on February 1, 1899, and in the Supreme Court on March 4, 1899.

"NINTH. The stipulation signed by the attorneys of the respective parties, filed in the Circuit Court December 9, 1898, and in the Supreme Court March 4, 1899, and to the effect that the preamble and resolutions set out in subdivision VII of the bill of complaint, were on November 2, 1898, by the Board of Commissioners of the port of Portland adopted by said board."

(Record, 191–192.)

Which stipulation was duly filed in said cause in said Supreme Court of the State February 7, 1901. (Record, 192.)

Assignment of Errors on Writ of Error to the Supreme Court of the United States.

"Now at this time comes Mary Phelps Montgomery, executrix of the last will and testament of James B. Montgomery, deceased, substituted for James B. Montgomery, defendant and respondent, in the above entit-

led case, and plaintiff in error to the Supreme Court of the United States, by her attorneys Stott, Boise and Stout and Mitchell & Tanner, and presents the following assignment of errors and prayer for reversal of the decision in the above entitled case in this court, by the Supreme Court of the United States:

"FIRST. The Supreme Court of the State of Oregon erred in holding that there was error in the decision and record of the court below, and in reversing the decree of said Circuit Court.

"SECOND. The Supreme Court of the State of Oregon erred in holding that the wharf lines established by the appellant, the city of Portland, on the 12th day of December, 1892, were then and ever since have been the legal and authorized wharf lines of the port of Portland.

"THIRD. The court erred in holding that the respondent had no right to drive piles or extend his wharf beyond the wharf line so held to have been established by the appellant, the city of Portland.

"FOURTH. The court erred in holding that the respondent, her attorneys, agents, servants and employees should be enjoined and restrained from driving piles or putting any structure in said river outside of said wharf lines, with a view to the construction of said or any wharf, and in holding that the appellants should have a decree directing and commanding respondent, her agents, servants and employees, to remove all said piles driven or structures of any description made or put therein outside of said wharf lines in the construction of said wharf.

"FIFTH. The court erred in holding and decreeing that the respondent, her agents, servants and employees, should be enjoined and restrained from driving piles or putting any other structures in said river outside of said wharf lines with a view to the construction of said wharf, and in directing and commanding respondent, her agents, servants and employees, to remove from said river all piles driven or structures of any description made or put in said river outside of said wharf lines in the construction of said wharf.

"SIXTH. The court erred in holding that the act of the legislature of the State of Oregon, and the 27th section of the 16th subdivision thereof, to wit, an act entitled "An Act to incorporate the City of Portland," which act became operative by being filed in the office of the Secretary of State of the State of Oregon, February 19, 1891, and which subdivision under the head of 'Chapter VII,' 'of the organization and power of the council,' reads as follows: '16. To regulate the building of wharves and the driving of piles in the Willamette and Columbia rivers within the limits of the city, and to establish a line beyond which wharves shall not be built nor piles driven' (Session Laws of 1891, page 805), was not repugnant, as claimed by the respondent Montgomery, to that paragraph of section eight of article one of the Constitution of the United States, which provides as follows: 'To regulate commerce with foreign nations and among the several States and with the Indian tribes,' and said court erred in holding that said statute of the State of Oregon was not repugnant to the twelfth section of the act of Congress entitled, 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors and for other purposes,' approved September 19, 1890, as claimed by respondent Montgomery; and said court erred in holding that said act of the legislature, hereinbefore referred to, was not repugnant, as claimed by the respondent Montgomery, to the seventh section of said act of Congress hereinbefore referred to, and said court erred in holding that the right and privilege, claimed by the respondent Montgomery, to construct his wharf at the place and where it is constructed, in virtue of said provision of the Constitution of the United States and of said act of Congress hereinbefore described, and of the act of the Secretary of War, in establishing harbor lines and in re-establishing the same in the harbor of the city of Portland, Oregon, and in granting to the respondent Montgomery, the privilege to extend his wharf beyond the harbor line as originally established, was not a valid claim or privilege upon the part of the respondent; and that the

same involve Federal questions, and the decision of all of which by this court were against respondent and to her prejudice.

"SEVENTH. The court erred in holding that the ordinance of the common council of the city of Portland, approved December 12th, 1892 (Ordinance No, 7995), entitled "An ordinance establishing a wharf line on the city front," and section one and three thereof, were not repugnant to the clause of the Constitution of the United States hereinbefore cited, and to sections seven and twelve of the act of Congress hereinbefore cited and to the authority of the Secretary of War exercised thereunder establishing harbor lines, as claimed by respondent in this case.

"EIGHTH. The court erred in holding that the act of the legislature of the State of Oregon, entitled "An act establishing and incorporating the port of Portland and to provide for the improvement of the Willamette and Columbia rivers in said port and between said port and the sea," approved February 18, 1891 (Session Laws of 1891, page 791), and which act is cited and in part set out in the bill of complaint in this case, and under and in pursuance of which the appellant in this court claimed certain rights, was not in conflict with and repugnant to the provisions of the Constitution of the United States hereinbefore cited, and in holding that it was not in conflict with and repugnant to the provisions of the act of Congress hereinbefore cited, and in holding that it was not in conflict with and repugnant to the authority exercised by the Secretary of War, under said clause of the Constitution of the United States and said act of Congress, in establishing the harbor lines in the Willamette river in the harbor of the city of Portland, Oregon."

"NINTH. The court erred in holding that the respondent Montgomery did not have the right to construct his wharf at the place and in the manner he was constructing the same at the commencement of the suit, and at the place and in the manner in which he admits he was constructing the same in the answer filed in this suit.

"TENTH. The court erred in holding that the defendant should pay the costs of this appeal.

"Wherefore, respondent prays, for the reasons hereinbefore assigned, that this case be reversed, and the decree of the Circuit Court affirmed."

(Record, 185–187.)

The Pleadings.

The facts stated in the bill of complaint are insufficient to constitute a cause of suit.

I.

The bill of complaint does not state facts sufficient to constitute a cause of suit in this, that there is no proper averment, either that the wharf being constructed by the respondent, Montgomery, is or ever will be an obstruction whatever to the navigation, or other use of the harbor, or that such wharf is or ever will be a public nuisance, or that its construction as proposed will in any manner, or to any extent, interfere with the work of the port of Portland in improving such harbor.

Bill of Complaint, Appellant's Abstract of Record, 1–9. (Record, 16–20.)

The objection that the complaint does not state facts sufficient to constitute a cause of suit is not waived by failure to demur, and this objection may be taken advantage of in the appellate court.

Hill's Annotated Laws of Oregon, vol. 1, sec. 71, p. 210.

Brown *vs.* Emerson, 3 Oregon, 452.

Evarts *vs.* Steger, 5 Oregon, 147.

Mack *vs.* Salem, 6 Oregon, 275.

Olds *vs.* Carey, 13 Oregon, 362.

Caldwell *vs.* Ruddy, 1 Idaho, N. S., 760.

Willits *vs.* Walter, 32 Oregon, 411.

II.

The court below had no jurisdiction of this cause, for the reason that the bill of complaint does not state facts sufficient to confer jurisdiction upon a court of equity. The court below, therefore, did not err in dismissing appellant's bill, and this objection is not waived by failure to demur.

Hill's Annotated Laws, vol. 1, sec. 71, p. 210, and authorities *supra*.

III.

The defendant, plaintiff in error here, was entitled to judgment on the pleadings, dismissing the plaintiff's bill of complaint for the reason no replication whatever was filed by the plaintiffs to the further and separate answer of the defendant setting up new matter.

Appellant's Abstract of Record, 17–26. (Record, 63–64.)

Therefore all the material averments in such separate answer must be taken as admitted by the plaintiffs to be true, and these admissions entitle the defendant to a decree dismissing the plaintiff's bill.

The controversy presented for the oonsideration and determination of this court in this case has relation to a conflict of jurisdiction between the Federal and State authorities in the matter of the establishing of harbor lines in one of the navigable harbors of the United States. It is asserted upon the part of the plaintiff in error and the defendant in the court below that a harbor line established by the Secretary of War, in pursuance of the authority asserted by section 12 of the River and Harbor Act of September 19, 1890 (26th Statutes at Large, pages 454–455), must stand as the harbor line in such harbor, and any wharf lines established by the State in such harbor, by the municipality under authority from the

State, must not conflict with the harbor lines so established by the Secretary of War, and if there is a conflict, then the act of the State must yield to that of the Federal Government. In other words, if the Federal Government, through the Secretary of War, establish a harbor line, designating a line inside of which vessels shall not be permitted to go to receive cargoes, then in such case the State, or the municipality acting under authority from the State, shall not be permitted to establish a wharf line in such harbor inside of the harbor lines so established by the Secretary of War, and outside of which wharves shall not be built. Thus establishing a line, as in this case, of some eighty-five feet at one point between the harbor line beyond which *inside* ships shall not be permitted to go, and the wharf line, *outside* of which wharves shall not be permitted to be built. To state the matter differently, Congress, in the exercise of the commercial power of the Constitution, defines the line inside of which, or landward, the ships of commerce shall not be permitted to go, and yet, according to the contention of our adversary in this case, the State can step in and nullify the whole business by fixing a line distant *inside* of the harbor line so established, of 50 or 100 or 200 feet *outside* of which wharves shall not be permitted, the effect of which would be the destruction of commerce in such harbors. In such a condition the vessel and the wharf could never meet. The cargo, to reach the ship, would necessarily have to be transported across an intervening body of water—separating the ship from the wharf.

Points and Authorities on Merits.

I.

By article 1, section 8, clause 3, of the Constitution of the United States, a grant of power is given to the Con-

gress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

This clause of the Constitution, which confers upon Congress the power to regulate commerce among the several States, leaves to the States, IN THE ABSENCE OF CONGRESSIONAL LEGISLATION, the power to regulate matters of *local* interest, which affect INTERNATIONAL AND INTERSTATE commerce only INCIDENTALLY; but the power of Congress over COMMERCE WITH FOREIGN NATIONS and interstate commerce is EXCLUSIVE whenever the matter is NATIONAL IN CHARACTER, and admits of a uniform system or plan of regulation.

In other words, as to those subjects of commerce which are *local* or *limited* in their nature or sphere of operation, such as the erection of bridges, the establishment of harbor lines in harbors, etc., the city may prescribe regulations, *until Congress assumes control of them*, but as to such as are *national in their character*, and *require uniformity of regulation*, the power of Congress is exclusive, and until Congress acts such commerce is entitled to be free from State regulation, exactions and burdens.

Gibbons *vs.* Ogden, 9 Wheat., 1.
Brown *vs.* State of Maryland, 12 Wheat., 419.
Wheeling Bridge Case, 13 How., 421.
Gillman *vs.* Philadelphia, 3 Wall., 713.
Cannon *vs.* New Orleans, 20 Wall., 577.
Wisconsin *vs.* Duluth, 96 U. S., 388.
Turner *vs.* Maryland, 107 U. S., 38.
South Carolina *vs.* Georgia, 93 U. S., 4.
Transportation Co. *vs.* Parkersburg, 107 U. S., 691.
Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.
Brown *vs.* Houston, 114 U. S., 624.

Morgan Steamship Co. *vs.* Louisiana, 118 U. S., 455.

U. S. *vs.* Duluth, 25 Fed. Cases, 925.

Ouchita Packing Co. *vs.* Aiken, 121 U. S., 444.

Gould on Waters, sec. 138, page 254.

Lawton *vs.* Steele, 152 U. S., 137.

Covington *vs.* Cincinnati Bridge Co. *vs.* Kentucky, 154 U. S., 204.

II.

The establishment of harbor lines in the navigable waters of the United States by Congress is an exercise of the constitutional grant of power to regulate commerce with foreign nations and among the several States, and although the State, or a municipality acting under authority from the State, may, *in the absence of any action by Congress*, establish such harbor lines, such action relating to a subject of *local* interest, and which affects international and interstate commerce only *incidentally*, yet, whenever Congress acts, then the power of the State is at an end, and if any conflict exist between the lines established by the national and State governments respectively, those of the State must give way to those established by the General Government.

Same authorities as above.

III.

Congress has jurisdiction, in the exercise of its power to regulate commerce, over the navigable waters of a river lying wholly within the limits of a single State.

Gibbons *vs.* Ogden, 9 Wheaton, 1.

Veasie *vs.* Moor, 14 How., 568.

Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 251.

Sillman *vs.* Hudson River Bridge Co., 2 Wall., 403.
Gillman *vs.* Philadelphia, 3 Wall., 713.
The Passaic Bridges, 3 Wall., 782.
Pound *vs.* Turke, 95 U. S., 459.
Brown *vs.* Houston, 114 U. S., 622.
Glocester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.
And authorities *supra*.

IV.

The action of Congress in enacting sections 7 and 12 of the river and harbor act of September 19, 1890 (26 Statutes at Large, pages 454–455), conferring certain powers on the Secretary of War, is not a delegation of legislative powers, and said sections are constitutional.

Wayman *vs.* Southard, 10 Wheaton, 1–43.
Cooley's Constitutional Limitations, 137.
Sutherland on Statutory Construction, sec. 68.
U. S. *vs.* Eliason, 16 Peters, 291.
The Gratiot *vs.* U. S., 4 How., 80.
Smith *vs.* Whitney, 116 U. S., 167.
Tilley *vs.* R. R. Co., 5 Fed. Rep., 641.
R. R. Co. *vs.* Dey, 35 Fed. Rep., 866.
In re Griner, 16 Wis., 447.
U. S. *vs.* Ormsbee, district court, southern district of Wisconsin, May 9, 1896, 74 Fed. Rep., 209.
Field *vs.* Clarke, 143 U. S., 649–693.
Locke's Appeal, 72 Penn. St., 491.
South Carolina *vs.* Georgia, 93 U. S., 13.
Miller *vs.* Mayor of New York, 109 U. S., 385.
U. S. *vs.* City of Moline, U. S. district court, northern district of Illinois, 82 Fed. Rep., 596.
U. S. *vs.* North Bloomfield Gravel Mining Co., U. S. circuit court, northern district of California, 81 Fed. Rep., 253.

State *vs.* Railroad Co., 37 N. W. Rep., 782.
State *vs.* Railroad Co., 35 N. W. Rep., 118.
Stone *vs.* Trust Co., 116 U. S., 307.
United States *vs.* Romard *et al.*, 89 Fed. Rep., 157.
Fallbrook *vs.* Irg. Dist. *vs.* Bradley, 164 U. S.
State *vs.* Gerhardt, 145 Ind., 439,
Sec. 12, deficiency act, March 9th, 1891, 26 U. S. Stat., pages 800–868.
Sec. 4, river and harbor act, Aug. 17th, 1894, Supp. Rev. Stat. U. S., vol. 2, page 250.
The People of Illinois *vs.* The Illinois Central R. R. Co., 91 Fed. Rep., 955.

V.

The power conferred on the Secretary of War by sections 7 and 12 of the river and harbor act of September 19, 1890, *supra*, is *plenary* and the enactment of those sections by Congress was a full exercise of all the constitutional power possessed by Congress in reference to the establishment of harbor lines, while the other portions of the act, relating to bridges, was only a *partial* exercise of the power exercised by Congress; therefore the two pieces of legislation, relating to the two different subjects, although all in the same act, are radically different in both purpose and scope, and the correct interpretation and application of the one—that is, that portion of the act relating to *bridges*, as considered and interpreted in the case of the Lake Shore and Michigan Railway Company *vs.* The State of Ohio, 165 U. S., 365, can have no legitimate bearing in the interpretation and application of sections 7 and 12 relating *solely* to the establishment of *harbor* lines. Sections 4 and 5 and a part of section 7 of the river and harbor act of September 19, 1890, relate to *bridges* (26 Statutes at Large, pages 426–453); while section 12 and a part of

section 7, same act, relate *solely* to the establishment of *harbor lines*.

26 Statutes at Large, 426–453.
Act Sept. 19, 1890, 26 U. S. Stat., 453–455.
Lake Shore & Michigan Railway Co. *vs.* State of Ohio, 165 U. S., 365.

VI.

The act of G. D. Meiklejohn, Secretary of War, is the act of the Secretary of War.

U. S. Rev. Stat., sec. 177, page 28.
Sup. U. S. Stat., vol. 1, 2d ed., page 707.

VII.

The power given to the Secretary of War by section 12 of the act of September 19, 1890, *supra*, to establish harbor lines, implies necessarily the power to modify, change or create anew.

United States *vs.* The Eliason, 16 Peters, 291.
United States *vs.* Romard, 89 Fed. Rep., 157.

VIII.

The facts, as presented by the pleadings and evidence, conferred jurisdiction on the Secretary of War to relocate and re-establish the harbor line in the manner the same was relocated and re-established by him September 23, 1898.

Numbers sixth, seventh and eighth of the findings of fact. (Abstract of Record, 35–43.) (Record, 35–40.)

IX.

The harbor lines caused to be established by the Secretary of War in front of the property of the respondent, Montgomery, August 9, 1892, was on proper application

changed and re-established by the Secretary of War, September 23, 1898.

Numbers sixth, seventh and eighth findings of fact. (Abstract of Record, 35–43.)

Sec. 12 act Sept. 19, 1890; 26 Stat., 455. (Record, 25–29.)

X.

Although it should be conceded that the Secretary of War is without power to change or re-establish a harbor line previously established by him, as contended for by counsel for appellants, it is clear beyond question he had by virtue of sections 7 and 12 of the river and harbor act of September 19, 1890, *supra*, power to grant a permission to the respondent, Montgomery, to extend his wharf outside the harbor line established August 9, 1892, and having on proper application done so, neither the State of Oregon, city of Portland, nor the port of Portland, had any right or power to prevent it.

Sections 7 and 12, river and harbor act September 19, 1890. (26 Statutes at Large, 426–453.)

Numbers sixth, seventh and eighth findings of fact. (Abstract of Record, 35–43.) (Record, 35–40.)

XI.

The wharf being constructed by respondent is located on lands bordering on the navigable waters of the Willamette river in Portland harbor, within the limits of the city of Portland, the fee of which is in the respondent, James B. Montgomery.

Paragraph VII, bill of complaint. Abstract of Record, 5 and 6. (Record, 18–19.)

Answer, paragraph VI, Abstract of Record, 14. (Record, 23.)

Also separate answer, paragraph I. Abstract of Record, 24. (Record, 257.)

Also fifth finding of fact, Abstract of Record, 35. (Record, 97.)

XII.

The riparian owner in Oregon, in the absence of restrictive legislation, has the right by the *common law* to connect his shore line by means of wharves, piers or docks constructed over the shoal or shallow waters immediately bordering upon his land with the waters *which are navigable in fact.*

This he has the right to do not only in his own interest as a riparian proprietor, but as well also in the interest of the public, and of national and interstate commerce.

Railway Company *vs.* Schurmeier, 7 Wall., 272.
Yates *vs.* Milwaukee, 10 Wall., 297.
Weaver *vs.* Harbor Commissioners, 18 Wall., 57.
Dutton *vs.* Strong, 1 Black, 23.

XIII.

But in the State of Oregon there is added to this common-law right of the riparian owner, *supra*, an *express grant from the State.* Section 4227, act of 1862, Hill's Code, which authorizes the owner of any land in Oregon lying upon any navigable stream, within the corporate limits of any incorporated town, to construct a wharf or wharves upon the same, and to extend such wharf or wharves into such stream beyond the low-water mark "*so far as may be necessary and convenient for the use and accommodation of ships*, or other boats or vessels that may or can navigate such stream."

Act of 1862, Hill's Code, sec. 4227.

XIV.

The question as to what constitutes a public nuisance must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a State can declare any particular business or structure a nuisance in a summary mode and enforce its decree at its own pleasure. Whether a bridge or a pier is a public nuisance or not, whether the same is an obstruction to navigation and commerce or not, is a *question of fact*, and no simple declaration of a municipality can determine the question.

Dutton *vs.* Strong, 1 Black, 32.
Yates *vs.* Milwaukee, 10 Wall., 504.
Angell on Tide Waters, 196.
West Hartford *vs.* Hartford Water Co., 68 Conn., 323, 36 Atlanta Rep., 786.
Milne *vs.* Davidson, 16 Am. Dec., 195.
Cooley on Court Limitations, 6th ed., 741, note.
Everett *vs.* Council Bluffs, 46 Iowa, 67.
Railroad Co. *vs.* Joliet, 79 Ill., 44.
Butchers' Union *vs.* Crescent City, 111 U. S., 746.
Smith *vs.* Minto, 30 Oregon, 353.
2 Dillon on Mun. Corp., 4th ed., sec. 800.
Grossman *vs.* City of Oakland, 30 Oregon, 478.

XV.

The provision of the city charter conferring power on the city of Portland, "to regulate the building of wharves and the driving of piles in the Willamette river within the limits of the city, and to establish a line beyond which wharves shall not be built nor piles be driven" (bill of complaint, Abstract of Record 2), does not authorize it to declare by a special ordinance that a private wharf is an obstruction to navigation and a public

nuisance, *if in point of fact* it is not such obstruction or a public nuisance.

Yates *vs.* Milwaukee, 10 Wall., 498.
Smith *vs.* Minto, 30 Oregon, 353.
Grossman *vs.* City of Oakland, 30 Oregon, 478.
And authorities *supra*.

XVI.

Conceding the right of both the city of Portland and the port of Portland, as claimed by appellants, to establish *wharf lines* in the harbor of the city of Portland, it is respectfully submitted that any action taken by the respondents in that regard in order to have any binding effect whatever, must be *reasonable* and we submit that the location of the line by the city of Portland, and by the port of Portland, as fixed by the former, December 12, 1892 (Abstract, 2), and by the latter November 23, 1898 (Abstract, 6), in front of respondent's property, in water averaging less than one foot in depth, and from bare ground at low water to not exceeding two feet in depth at any point (Abstract, 35 and map Exhibit "A" part of answer), was an *unreasonable exercise of municipal power* upon the part of appellants and binds nobody.

Authorities, *supra*.

XVII.

Conceding for the argument that the city of Portland had the power to establish a wharf line, and to declare that wharves should not be extended outside of such line, even then the simple declaration of the municipality that the wharf was being constructed outside of such lines, and that the construction of the same was an obstruction to navigation and therefore a public nuisance, will not determine the question; and on such a declaration alone in the complaint, especially if the answer denies that the construction of the wharf does in any manner interfere

with navigation or commerce, or the improvement of the river, and that it is not a nuisance, either public or private, the plaintiff, the municipality, must prove by evidence, *other than the mere declaration of the city itself*, that the structure does interfere with navigation, or the improvement of the river or commerce, and that it is a public nuisance.

Yates *vs.* Milwaukee, 10 Wall., 498.
Angell on Tide Waters, 196.
And authorities, *supra*.

XVIII.

In the incorporation act of the port of Portland (bill of complaint, Abstract of Record, 3–4) there is no authority whatever conferred upon the port of Portland to establish *harbor* lines or *wharf* lines. The act, therefore, upon the part of the commissioners of the port of Portland, immediately preceding the commencement of this suit, November 2, 1898, in establishing by resolution (bill of complaint, Abstract of Record, 5–6) wharf lines on both sides of the Willamette river, was *ultra vires* and amounts to nothing; nor has the port of Portland any authority or jurisdiction whatever to declare what shall or shall not be the harbor or wharf line in the harbor of the city of Portland, or to declare what shall or shall not constitute a public nuisance in the Willamette river.

Sections, 6, 7 and 12, river and harbor act, September 19, 1890, 26 Stat., 453-456.
Sec. 7, act 1890, as amended July 13, 1892, Supp'l Rev. Stat. U. S., vol. 2, page 30.

XIX.

The harbor lines having been established in the Portland harbor by the Secretary of War, August 9, 1892, in pursuance of the power conferred on him by the twelfth

section of the river and harbor act of September 19, 1890 (26 Statutes at Large, 46), therefore, the ordinance of the common council of the city of Portland, approved December 12, 1892, establishing harbor or wharf lines (Abstract of Record, 2) was unconstitutional and wholly inoperative, except in so far as the harbor or wharf line established by such ordinance did not conflict with the line established by the Secretary of War; and wholly unconstitutional and inoperative as placing any restraint whatever on the Secretary of War to *grant permission* for the extension of a wharf or pier outside of the line established by him August 9, 1892, as authorized by the seventh and twelfth sections of the act, *supra*; and by the re-establishment by the Secretary of War of the harbor line in front of the respondent's property, September 23, 1898, and by the permit of the Secretary authorizing Montgomery to extend his wharf outside the harbor ine established August 9, 1892, the harbor or wharf line established by said city ordinance, in so far as it conflicts with the line as thus re-established by the Secretary of War, and with the permit of the Secretary of War, became a dead letter and wholly fruitless of any right whatever.

Authorities, *supra*.

XX.

From the pleadings in this case (bill of complaint, Abstract of Record, 1–9), (Record 16, 17), it is shown, and conceded by complainants, that no action whatever had been taken either by the city of Portland or the port of Portland, establishing either harbor or wharf lines in the harbor of Portland prior to August 9, 1892, when the harbor lines in said harbor were caused to be established by the Secretary of War. And it is further shown and conceded by said bill of complaint, that the

State of Oregon had not, prior to September 19, 1890, the date of the passage of the river and harbor act, *supra*, conferring power on the Secretary of War to cause harbor lines to be established in the navigable harbors of the United States, passed any act conferring upon the city of Portland power to establish harbor or wharf lines. This power on the part of the city only dates from February 19, 1891 (bill of complaint, Abstract of Record, 2). (Record 16, 17.) When, therefore, the General Government, in the interest of international and interstate commerce, assumed jurisdiction of the waters of the Portland harbor by establishing harbor lines therein, neither the State of Oregon, nor the city of Portland, nor the port of Portland, had established or attempted to establish any such harbor lines.

Bill of complaint, Abstract 1–9. (Record 16, 17.)

XXI.

"The authorities of a town will not be permitted to locate an imaginary deep-water line away from the navigable part of a river or bay and without making the water navigable up to that line, so as to deprive the riparian owners of the advantages of wharves, under a provision of law conferring upon such town the right to regulate the line of deep water to which wharves may be built."

Wool *vs.* Edenton, 117 S. C.; 1, 23 S. E. Rep., 40.

And authorities *supra*.

XXII.

Whenever a police power is so exercised by a State as to come within the domain of Federal authority, as defined by the Constitution, the latter must prevail.

Gibbons *vs.* Ogden, 9 Wheat., 1–210.

Henderson *vs.* The Mayor, 92 U. S., 259–272.

New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650–661.

Morgan *vs.* Louisiana, 118 U. S., 464.

XXIII.

The police power does not extend to depriving any person of the lawful use of property without due process of law, and without just compensation.

Matter of Jacobs, 98 N. Y., 110; 50 Am. Rep., 636.

Matter of Cheesbrough, 78 N. Y., 232.

Rockwell *vs.* Nearung, 35 N. Y., 302.

14 amendment, Const. U. S.

XXIV.

" Wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river." (Transportation Co. *vs.* Parkersburg, 107 U. S., 707.) No foreign or interstate commerce can be carried on with the citizens of a State without the use of a wharf.

Mr. Justice Field in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 205.

Argument as to Insufficiency of the Bill of Complaint to Constitute a Cause of Suit.

It is submitted the bill of complaint in this case does not state facts sufficient to constitute a cause of suit, or to confer jurisdiction on a court of equity as to subject-matter.

A careful examination of the complaint will disclose the fact that there is no averment in it from beginning to end, to the effect that the driving of piles and the construction of the wharf by the defendant, Montgomery, in any manner injures the harbor of Portland, obstructs

its navigation, or in any manner prevents either the city of Portland, or the port of Portland, from deepening or widening the channel of the Willamette river in said city.

There is no averment that the work being constructed by the defendant, Montgomery, either constituted a nuisance, public or private, at the commencement of this suit, or that the same will, if completed, constitute any such nuisance.

It is true the bill of complaint avers that on a certain date the board of commissioners of the port of Portland, at a meeting duly called and held, adopted certain resolutions upon that subject, and that on a certain other date, November 23, 1898, at another meeting of the board of commissioners of the port of Portland, duly called and held, said commissioners adopted a certain wharf line, and did further resolve that the observance of such wharf line in the construction of wharves is necessary for a good and sufficient width of channel in said river, etc. But it is respectfully submitted, that the averment in the bill of complaint that said resolutions were adopted some time previously by the board of commissioners of the port of Portland, even conceding any power in said board to pass such resolutions, which we deny, is very far from being equivalent to an averment in the bill of complaint itself of the *existence of the facts stated in the resolutions*, and, further, that said board of commissioners had no jurisdiction or power to adopt such resolutions, or establish wharf lines; therefore, unless, after eliminating these two sets of resolutions from the bill of complaint, there is sufficient left in the bill to constitute a cause of suit, then the judgment of the court below should be reversed, if for no other reason, because of the failure of the bill of complaint to state facts sufficient to constitute a cause of suit. (Record, 16–20.)

A critical examination of the bill of complaint will show that, briefly stated, the following are the *sole* material averments it contains:

1. The appellant, The City of Portland, is a municipal corporation in the State of Oregon, existing by and uuder the laws of said State.

2. That the charter of said city provides that its common council "shall have power to regulate the building of wharves and driving of piles in the Willamette and Columbia rivers within the city of Portland, and to establish a line beyond which wharves shall not be built or piles driven," and that such provision has been since February 19, 1891, and is now, in full force and effect.

3. That on the ninth day of August, 1892, the United States engineers established a wharf line in the Willamette river within said city of Portland.

4. That by section 1 of an ordinance of the common council of said city, approved December 12, 1892, the wharf lines of the Willamette river were established in conformity to and coincident with the wharf lines established by the U. S. engineers.

5. That section 3 of said ordinance provides as follows: "All wharves or other structures hereafter built or erected on the river front of the city on the east side of the Willamette river shall not extend westerly beyond the line as laid down in section 1 of this ordinance, and all permits hereafter granted by the common council for the driving of piles, or the erection of structures, shall conform to said line."

6. That on the eighteenth day of February, 1891, the Legislative Assembly of the State of Oregon passed an

act incorporating the port of Portland, sections 1, 2, 3, and 9 of which are set out in the bill of complaint.

7. That the defendant, James B. Montgomery, is now and for some time has been engaged in the construction of a wharf on the east side of the Willamette river, within the city of Portland, and is driving piles and otherwise proceeding with the construction of said wharf in said river outside of the wharf line established as aforesaid, and proposes and declares his purpose to be to construct and complete said wharf between the center line of Essex street projected, to the river on the north, and the center line of Randolph street projected, to the river on the south, and extending into the river eighty-five feet beyond the said wharf line, and occupying more than 30,000 square feet of the bed of said river.

8. That on the twenty-first day of November, 1898, the board of commissioners of the port of Portland, at a meeting duly called and held, adopted certain resolutions, which are set out in the record.

9. And on the twenty-third day of November, 1898, at a meeting of the board of commissioners of the port of Portland, duly called and held, another resolution, which is set out in the record, was passed.

10. That the Willamette river is a river wholly within the State of Oregon.

11. That the defendant, Montgomery, notwithstanding said ordinance of the city and the proceedings of said port of Portland, persists in the construction of said wharf as aforesaid, and will, unless restrained by an order of the court, complete said wharf in the manner and to the extent indicated.

12. That the appellants have no plain, speedy or adequate remedy at law.

Abstract of Record, 1–9. (Record, 16–20.)

Conceding, therefore, for the present, the right of the respondents to sue, and also their right to establish wharf lines and regulate their construction and use; on these several averments, which, when boiled down, mean simply this: that the defendants in error established wharf lines; that in an ordinance of the city and in the resolutions of the board of commissioners of the port of Portland establishing said lines, it was declared wharves should not be constructed beyond them, and that the respondent, Montgomery, is about to extend his wharf beyond said line, and without any averment in the complaint that the action of Montgomery in so extending his wharf in any manner, or to any extent, obstructs the navigation or commerce of the harbor, or in any manner interferes with the work of the port of Portland in improving such harbor, or that his action, if permitted to go on, will create a nuisance either public or private, or that such wharf is being constructed any further beyond the line of low-water mark *than is necessary and convenient for the use and accommodation of ships entering said harbor*, a court of equity is asked to enjoin respondent from proceeding with the construction of his wharf.

We respectfully submit the bill of complaint, taken as a whole, and however construed, fails to state facts sufficient to constitute a cause of suit, and also fails to state facts sufficient to confer jurisdiction on a court of equity.

The objections that the complaint does not state facts sufficient to constitute a cause of suit, and that the court has not jurisdiction, are not waived by failure to demur, and these objections may be urged in the appellate court.

Hill's Annotated Laws of Oregon, vol. 1, sec. 71, p. 210.
Brown *vs.* Emmerson, 3 Oregon, 452.
Evarts *vs.* Steger, 5 Oregon, 147.
Mack *vs.* Salem, 6 Oregon, 275.
Olds *vs.* Cary, 13 Oregon, 362.
Kaldwell *vs.* Ruddy, 1 Idaho, N. S., 760.

Upon filing separate answer by defendant in court below (Abstract of Record, 17–26; Record, 25–30), and failure of respondents to file any reply, defendant was entitled to judgment on the pleadings dismissing bill of complaint.

The court will observe, by reference to the abstract of record, that the defendant in his answer, after making certain admissions and denials of the averments of the complaint (Abstract, p. 10–17), makes a further and separate answer to the bill of complaint, setting up new matter in defense. (Abstract, 17–26.) To this answer no replication has been filed, either to the whole or any part of it. Therefore, all material averments in the same must be taken as true. (Record, 25–30.)

Counsel for plaintiffs filed a demurrer to certain portions of said separate answer, and a motion to strike out certain other portions, both of which were overruled by the court, and no further pleading was filed.

No question was made in appellant's brief in the lower court as to the correctness of the decision of the court below in overruling said demurrer and motion to strike out.

The court will bear in mind there is no averment in the bill of complaint, aside from the recital of the resolutions of the board of commissioners of the port of Portland, to the effect that the construction of the respondent's wharf will in any manner interfere with the

commerce or navigation of the harbor, or that the same will in any manner interfere with the work of the port of Portland in widening and deepening a channel, or that the same will be a nuisance, either public or private, nor that the said wharf is being constructed further beyond the line of low-water mark than is *necessary or convenient for the use and accommodation of vessels.* (Hill's Code, sec. 4227.)

While the respondent, in court below, in his separate answer makes the following affirmative averments, the same not being a denial of any averments in bill of complaint, none of which are denied by any reply, and therefore must be taken as true:

"The defendant further avers that the construction of his said wharf at the place and in the manner he is constructing and intends to complete the same, does not in any respect curtail the navigable waters of the Willamette river at the city of Portland, nor is the same, nor will it be any obstruction to navigation or to the work of the port of Portland in making and maintaining a proper depth of water, in so far as the port of Portland may have any rights in the premises. Defendant avers that the construction of said wharf as planned and being constructed by him, instead of being an injury to the commerce and navigation of the Willamette river at the port of Portland, will be a benefit to the same, and a valuable aid in the carrying on of foreign and interstate commerce at said port of Portland." (Abstract of Record, 24–25.) (Record, 29.)

The following is section 4227 of Hill's Oregon Code above referred to.

"The owner of any land in this State lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water *beyond low-water mark so far*

as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water."

We submit, therefore, in any view of the matter, respondent is entitled to judgment and decree on the pleadings dismissing bill of complaint. The total insufficiency of the complaint in this case will be more fully demonstrated when we come to review the opinion of the court below in the closing pages of this brief and argument.

Argument on Merits.

I.

The assignment of errors, Nos. 6, 7, 9, 10, and 11 (Abstract of Record, 50–51), we refer now to the plaintiff's assignment of errors in the court below (Record, 447), may be considered as one, as there is really but one question involved in these assignments, and the *query* they suggest is simply this:

Assuming that the Secretary of War has the constitutional and statutory power to establish harbor lines in the harbor at the city of Portland, and assuming furthermore that he has in pursuance of such power established such harbor lines, then must any harbor or wharf lines established by the State, or by the city or port of Portland, under authority from the State, give way to the latter, in so far as they conflict with the lines established by the Secretary of War?

In other words, must the national authority or the State authority be paramount?

Leaving, therefore, the question as to the constitutionality of section 12 of the river and harbor act of Congress of September 19, 1890 (26 Stats, 455), which is the question suggested by the *third* assignment of error, and

also the question as to the right of the Secretary of War to change in September, 1898, the harbor lines established by him in August, 1892, as questioned by the *fourth* assignment, and also the question as to whether from the facts stated in the pleadings and evidence, the acting Secretary of War, G. D. Meiklejohn, had any jurisdiction to fix or interfere with the harbor lines in the city of Portland, as suggested by the *fifth* assignment, all to be discussed and considered later in this brief, and assuming for the present that none of these assignments are well taken, we will endeavor to establish the proposition that the harbor lines as established by the Secretary of War, September 23, 1898, must control, and any *harbor* or *wharf* lines established by the city, or port of Portland, in so far as they conflict with the lines thus established in virtue of the national authority in September, 1898, must be regarded as abrogated, inoperative and void.

The solution of these questions involves a careful consideration and determination of the powers respectively of the national and State governments, in respect to the establishment of harbor lines in the navigable waters of the United States.

The inquiry arises, therefore:

First. What are the character and extent of the power conferred on Congress by what is known as the commercial clause of the Constitution of the United States?

Second How far and to what extent has such power been exercised by Congress?

In many instances Congress has never yet exercised to its full limit *all* the power conferred by certain grants in the Constitution, while in others the full power granted has been exercised.

For instance, there are many subjects of legislation, doubtless, in reference to which Congress might consti-

tutionally legislate in virtue of the power conferred by the commercial clause, but in reference to which in some instances no action whatever has been taken by Congress, while in respect to others there has been only a *partial* exercise of the power granted.

As will be seen as we progress with this argument, there has been only a partial exercise of the power upon the part of Congress in reference to the *construction of bridges* over navigable waters of the United States, still leaving a modicum of power to the States respectively; while the power to establish *harbor lines* has been exercised by Congress to its *fullest extent*, leaving nothing whatever to the States, after Congress has acted.

We will concede in the outset that until the National Government acts, and establishes harbor lines in any navigable harbor of the United States lying wholly within the limits of a State, the power to establish harbor lines in such harbor is vested in the State within which such harbor lies, and the State in that case may either directly, or through a municipality, rightfully exercise such power and establish such harbor lines.

But, we submit as an incontrovertible proposition, that whenever Congress acts, either directly or through a proper instrumentality, such as the Secretary of War, and establishes harbor lines in any navigable harbor of the United States, although the same may be located wholly within the limits of a State, that then any harbor lines or line established in such harbor, either before or afterwards, by the State, or by any municipality operating in pursuance of authority conferred by the State, which in any manner conflict with the lines thus established by the General Government, must give way to the lines so established by the paramount authority.

The Principle Involved.

The principle involved in this controversy is one which more than any other has in the past history of this country commanded the best thought of both jurists and statesmen. The question as to the precise line which separates from each other the respective powers of the National and State governments, has, for more than three-quarters of a century, presented a controversy in Congress and legislatures, and judicial courts as well, wherein the best minds of the country were called into action, and which finally culminated in civil war; and yet, in the gradual development of the nation there must, in the very nature of things, arise from time to time disputes and conflicts of jurisdiction to be settled by the courts as to the proper location of this line of separation. The courts, both Federal and State, always careful that every right which properly attaches to a State should be preserved, have ever proceeded on the theory that it is infinitely better that the States respectively should be deprived of a *doubtful* power, rather than that the National Government should be deprived of a *doubtful* prerogative, and which might, therefore, tend to weaken its paramount authority and sovereign capacity as a national government; and hence it is, if the question at issue bearing upon this subject is at any time in any controversy one of doubt, that doubt should always, in defining and distributing the powers of the Federal and State governments, be resolved in favor of the former. It is believed, however, the questions involved in the case at bar have not been left in any doubt by the decisions of our highest judicial tribunal, and that they will, therefore, be found of easy solution by this honorable court.

At the risk of extending this argument to an unusual

length, we, for the convenience of the court, quote freely from authorities cited in support of our several propositions.

Authorities in Point.

II.

Mr. Justice Field, in Gloucester Ferry Company *vs.* Pennsylvania, 114 U. S., page 203, says:

"The power to regulate commerce between the States, as well as with foreign nations, vested in Congress, is the power to prescribe the rule by which it shall be governed; that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control *all the instrumentalities by which the commerce may be carried on and the means by which it may be aided and encouraged.* The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them which are local and limited in their sphere of operation the States may prescribe regulations *until Congress intervenes and assumes control of them*, yet, when they are *national* in their character and require uniformity of regulation affecting alike all the States, *the power of Congress is exclusive.*"

County of Mobile *vs.* Kimball, 102 U. S., 697.

Mr. Cooley, in Cooley's "Constitutional Limitations," page 732, says:

"It is not doubted that Congress has the power to act beyond the general regulations of commerce which it is a custom to establish, and to descend to the most *minute directions* if it shall be deemed advisable, and that to *whatever extent* ground shall be covered by those directions, *the exercise of State power is excluded.*

Cooley's "Constitutional Limitations," 732.

In the case of Wisconsin *vs.* Duluth, 96 U. S., 383, in which the question as to the power of Congress and the

rights of the States, respectively, to regulate commerce on the navigable waters and rivers of the country was considered, the Supreme Court of the United States, speaking by Mr. Justice Miller, said:

"It is not to be observed, as preliminary to an examination of the acts of the General Government in the special matter before us, that the whole system of river, lake and harbor improvements, whether on the seacoast or on the lakes, *or the great navigable rivers of the interior*, has, for years, been mainly under control of that Government, and that *whenever it has taken charge of the matter its right to the exclusive control has not been denied* * * * nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the Government was organized under the Constitution. The only question ever arising has been how far and under what circumstances the exercise of the power is exclusive of its exercise by States. And while this Court has maintained, in many cases, the right of States to authorize structures in and over navigable waters of the States, which may either impede or improve their navigation, *in the absence of any action of the General Government in the same matter*, the doctrine has been laid down with unvarying uniformity, that when Congress has, by any expression of its will, occupied the field, *that action was conclusive of any right to the contrary asserted under State authority.* The adjudged cases in this Court on this point are numerous. This subject was recently very fully considered in South Carolina *vs.* Georgia *et al.*, 93 U. S., 4; and it is affirmed in Pound *vs.* Turcke, 95 U. S., 495. The doctrine was settled, however, long before this. The following cases are fully in point: Gibbons *vs.* Ogden, 9 Wheat. 1; Wilson *et al. vs.* Blackbird Creek Marsh Company, 2 Peters, 245; Wheeling Bridge case, 18 Howard, 421; Gillman *vs.* Philadelphia, 3 Wall., 713."

In the case of Aldrich *vs.* The W. H. Beeman *et al.*, United States district court of New Jersey for the district of New Jersey, 45 Federal Reporter, 125, which case grew

out of a collision occurring July 28, 1889, in the East river, between a ferry-boat and a canal-boat towed by a tug, the State of New York had passed a law, prior to such collision, providing that the East river, between the Battery and Blackwell's island, should be navigated, as nearly as possible, in the middle of the stream. The court held that this act upon the part of the State was valid, but the decision was placed distinctly upon the ground that the State act was not in any respect in conflict with any act of Congress upon the subject regulating commerce with foreign nations. The court said:

"Congress is empowered to regulate both foreign and interstate commerce, and, whenever navigable waters form a highway over which commerce, foreign or interstate, is conducted, they must fall under the legislative control of the Federal Government. The fact that certain waters are navigable and are used for foreign or interstate commerce, does not exclude legislative regulation by a State, if, in fact, *Congress has not legislated in regard to them;* or, if such legislation has been had by Congress, if the legislation of the State *does not come in conflict with the congressional legislation, and is not antagonistic to the rights conferred or granted thereby, its validity is unquestionable.* * * * This statute of New York governing the conduct of vessels, while navigating the East river, *does not*, as far as I am informed, *conflict with or violate any legislation of Congress relating to commerce.*"

See Gould on Waters, sec. 138, page 254.

"It is competent for the State to establish wharf or harbor lines, and to empower commissions to license wharves and piers extending to such lines. Such statutes do not conflict with the commercial power of Congress *so long as the latter remains unexercised.*"

Savannah *vs.* State, 4 Georgia, 26.

Houck on Rivers, sec. 275, page 177, says:

"In this country, as well as in England, the public ports are considered as the great gates of the republic,

through which all its foreign intercourse by water is conducted; and, consequently, they can only be established and must, in some respects, be regulated by that department of the Government to which has been delegated the care of foreign commerce."

In the case of South Carolina *vs.* Georgia *et al.*, 93 U. S., page 11, the Supreme Court, Mr. Justice Strong delivering the opinion, said:

"It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage, if, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over foreign and interstate commerce is concerned, this is not to be doubted. * * * Upon this subject the case of Pennsylvania *vs.* Wheeling and Belmont Bridge Company, 18 Howard, 421, is instructive. There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and, consequently, the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction to navigation, It was, therefore, decided that the act of Congress declaring a bridge over the Ohio River, which, in fact, did impede steamboat navigation, to be a lawful structure, and requiring officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of Congress to regulate commerce."

South Carolina *vs.* Georgia, 93 U. S., 4.

In Gibbons *vs.* Ogden, 9 Wheat., 1–34, at page 7, Chief Justice Marshall, in defining the meaning of the term "commerce" in the clause of the Constitution, said:

"All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, must all have understood it in that sense; and the attempt to restrict it comes too late. * * * The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce." * * * If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State."

See also opinion of Justice Johnston, pages 27, 30, 31.

In the case of Herrman *vs.* Beef Slough Manufacturing Company, in the circuit court of the United States for the western district of Wisconsin, the court (Judge Bunn), after holding that in that case Congress had never assumed jurisdiction to regulate commerce on the Chippewa river, said:

"But, *until Congress assumes to control the commerce of the river*, I take it to be clear law that, as to those streams that are wholly within the territory of a State, though approachable by other streams from other States, as in this case from the Mississippi river, that the State within whose borders such rivers lie may legislate in reference to its commercial use as a public highway."

Herrman *vs.* Beef Slough Manufacturing Co., 1 Fed. Rep., 153.

Mr. Justice Field, in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., page 212, says:

"*The control of the navigable waters of a port and of all public waters constituting channels of communication* between the States and foreign countries, is embraced within the commercial power of Congress, and *equally beyond the interference of the States.*"

Steamship Co. *vs.* Port Wardens, 6 Wall., 31.

The word "commerce," used in the commercial clause of the Constitution, comprehends "navigation" within its meaning, and the power to regulate "*navigation*" is as expressly granted as though that word had been added to the word "commerce."

Gibbons *vs.* Ogden, 9 Wheat., 7–8–9–22–30–31.

Pennsylvania *vs.* Wheeling Bridge Co., 13 How., 518.

South Carolina *vs.* Georgia, U. S., 4.

In the case of the United States *vs.* Bellingham Bay Boom Company, circuit court of appeals for the ninth circuit, decided June 28, 1897, 81 Federal Reporter, 659, that court held that the enactment of section 10 of the river and harbor act of September 19, 1890, was an exercise of the constitutional right of Congress to regulate commerce between the States. The language of the court is this:

"At the time of the passage of the law by the State of Washington, and of the construction of the boom, there was no direct statute of the United States prohibiting the construction or maintenance of such booms in the inland rivers of the State. The adoption of section 10, of the act of Congress, *was an exercise of its constitutional right to regulate commerce between the States.* The object was to take control of the navigable waters of the United States so as to protect the interests of the Government, and prevent obstructions to the free navigation of such

waters. It was intended to apply to all cases where the States had failed to pass any law in regard thereto, and to prohibit obstructions not authorized by law. But it was not intended by Congress to be retroactive in its results."

In the case just cited, the boom, which it was sought to remove as an obstruction in the Nooksack river in the State of Washington, had been constructed prior to the passage of the river and harbor act of September 19, 1890, under an act of the legislature of the State of Washington authorizing the same. Therefore, the court held it could not be affected by the Congressional act.

It is conceded that *in the absence of legislation by Congress on the subject*, the State may authorize bridges or other works across navigable streams which are wholly within the State, and such legislation is not repugnant to the Constitution of the United States.

Wilson *vs.* Blackbird Creek Marsh Company, 2 Peters, 245.

Gillman *vs.* Philadelphia, 3 Wall., 713.

Pound *vs.* Turcke, 95 U. S., 459.

And generally, in respect to commercial matters which are *local* and *limited in their scope*, not requiring national and uniform regulations, the States may regulate them *until Congress intervenes*, but as soon as Congress acts the *State is excluded*.

Gloucester Ferry Company *vs.* Pennsylvania, 114 U. S., 196.

Brown *vs.* Houston, 114 U. S., 622.

Under this grant of power it is unquestionably the right of Congress, if it shall deem proper to exercise it, to *exclusively* regulate and control, with reference to the construction of bridges, the establishment of harbor lines, and the erection of other local structures, in all

navigable waters of the United States, *whether such waters, either rivers, harbors or bays, lie wholly within a State or otherwise.*

The Wheeling Bridge Case.

In the case of Pennsylvania *vs.* Wheeling Bridge, 13 Howard, 621, it was held that a law of the State of Virginia authorizing the construction of the bridge over the Ohio river at Wheeling was inoperative and void, for this reason, among others: Because it was in conflict with the legislation of Congress, which regulates commerce among the different States and with foreign nations, carried upon that river.

In that case objection was made that there was no act of Congress prohibiting obstructions in the Ohio river. To this objection the court, in its opinion by Mr. Justice McLean, replied as follows:

"It is objected that there is no act of Congress prohibiting obstructions in the Ohio river, and that until there shall be such a regulation, a State in the construction of bridges has the right to exercise its own discretion on the subject. Congress have not declared *in terms* that a State by the construction of bridges or otherwise shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as above remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for the neglect of these duties by which damage to life or property has resulted."

In the case of the State of Pennsylvania *vs.* Wheeling Bridge Co., 13 Howard, 565 *supra*, dissenting opinions were delivered by Chief Justice Taney and Associate Justice Daniels, who, while conceding the power of Congress to regulate commerce upon the Ohio river, dissented for the reason that in their opinion Congress had

never exercised the power in such manner as to prevent the State of Virginia from authorizing the construction of the bridge: In other words, these justices, in their dissenting opinions, held more strongly than did the majority of the court in favor of the rights of the States respectively as against those of the General Government. Therefore any statement of law by Mr. Chief Justice Taney as to the extent of the power of Congress in the premises should be taken as correct, at least in so far as it is applicable to the specific powers conceded by him, as he was a strict constructionist.

For the purpose of showing how he regarded the power of Congress under the commercial clause we quote the following from his dissenting opinion (13 Howard, 580):

"The Ohio being a public navigable stream, Congress has undoubtedly the power to regulate commerce upon it. They have the right to prohibit obstructions to its navigation; to declare any such obstruction a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it; and to punish any one who may erect or maintain it; or it may declare what degree or description of obstruction shall be a public nuisance, as, for example, the height of a bridge over the river, or *the distance to which a wharf may be extended into its navigable waters.*"

Mr. Justice Taney, proceeding further, says:

"*But this power has not been exercised. There is no law of the United States declaring an obstruction in the Ohio or any other navigable river to be a public nuisance* and directing it to be abated as such. Nor is there any act of Congress regulating the height of bridges over the river. We cannot derive any jurisdiction therefore upon this subject from any law of the United States, and if we exercise it we must derive our authority from other sources."

Here, then, is this great State's right jurist, Chief Jus-

tic Taney, asserting that Congress has power under the commercial clause of the Constitution to determine "*the distance to which a wharf may be extended into navigable waters.*"

In the case of The People *ex rel.* Board of State Harbor Commissioners *vs.* Potrero and Bay View Railroad Co., 67 Cal., 166, the supreme court of the State held that while the power of the State with respect to the construction, regulation, and control of bridges over navigable streams is subordinate to that of Congress, still *until Congress acts on the subject the power of the State is plenary.*

Cardwell *vs.* American Bridge Co., 113 U. S., 205.

The Cincinnati Bridge Company Case.

The line between the respective powers of the National and State governments as applicable to the case under consideration has nowhere been so clearly defined as by the Supreme Court of the United States, opinion by Mr. Justic Brown, in the case of Covington and Cincinnati Bridge Co. *vs.* Kentucky, 154 U. S., 204. This opinion is so clear and instructive that we must be pardoned for quoting from it at some length. The court, at page 209, says:

"The adjudications of this court, with reference to the power of the States over the general subject of commerce, are divisable into *three* clas-es:

"*First.* Those in which the power of the *State is exclusive.*

"*Second.* Those in which the States may act *in the absence of legislation by Congress.*

"*Third.* Those in which the *action of Congress is exclusive* and the States cannot interfere at all."

The court proceeding further says:

"The *first* class, including all those wherein the States have plenary power, and Congress has no right to inter-

fere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power the State may authorize the construction of highways, turnpikes, railways, and canals between points in the same State, and regulate the tolls for the use of the same (Railroad *vs.* Maryland, 21 Wall., 456), and may authorize the building of bridges over *non*-navigable streams, and otherwise regulate the navigation of the *strictly internal waters of the State, such as do not, by themselves, or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other States or foreign countries.* (Veazie *vs.* Moor, 14 How., 568; The Montello, 11 Wall., 411; S. C., 20 Wall., 430.) This is true, notwithstanding the facts that the goods or passengers carried or traveling over such highway between points in the same State may ultimately be destined for other States, and, to a slight extent, the State regulations may be said to interfere with interstate commerce. * * * Congress has no power to interfere with police regulations relating *exclusively to the internal commerce of the States* (United States *vs.* De Witt, 9 Wall., 41; Patterson *vs.* Kentucky, 97 U. S., 501), nor can it by exacting a tax for carrying on a certain business thereby authorize such business to be carried on within the limits of a State. (License Tax Cases, 5 Wall., 462, 470, 471.)"

The court in the case, *supra*, proceeding to define the class of cases that comes under the *second* head *supra*—that is, those cases wherein the States may act *in the absence of legislation by Congress*, says:

"Within the *second* class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots; Cooley *vs.* Philadelphia Board of Wardens, 12 How., 299; Steamship Co. *vs.* Joliffe, 2 Wall., 450; *Ex parte* McNeal, 13 Wall., 236; Wilson *vs.* McNamee, 102 U. S., 572. Quarantine and inspection laws *and the policing of harbors;* Gibbons *vs.*

Ogden, 9 Wheat., 1–203; City of New York *vs.* Miln, 11 Peters, 102; Turner *vs.* Maryland, 107 U. S.,38; Morgan Steamship Co. *vs.* Louisiana, 118 U. S., 455. The improvement of navigable channels: County of Mobile *vs.* Kimball, 102 U. S., 691; Escanaba Co. *vs.* Chicago, 107 U. S., 678; Huse *vs.* Glover, 119 U. S., 543. *The regulation of wharves, piers and docks:* Cannon *vs.* New Orleans, 20 Wall., 577; Packet Co. *vs.* Keokuk, 95 U. S., 80; Packet Co. *vs.* St. Louis, 100 U. S., 423; Packet Co. *vs.* Catlettsburg, 105 U. S., 559; Transportation Co. *vs.* Parkersburg, 107 U. S., 691; Ouchita Packet Co. *vs.* Aiken, 121 U. S., 444. The construction of dams and bridges across the navigable waters of a State: Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 245; Cardwell *vs.* American Bridge Co., 113 U. S., 205; Pound *vs.* Turk, 95 U. S., 459; and the establishment of ferries: Conway *vs.* Taylor's Executors, 1 Black, 603."

The court proceeding further, in the case of the Covington Bridge Company, *supra*, after referring to the fact that it had been held by some in the early history of the Government that the mere *grant* to Congress of power to regulate these matters, was in and of itself a *prohibition on the States* to exercise the same power, and also to the later and well-settled rule that it is not the *grant* of power that deprives the State of power, but the *exercise* of the same upon the part of Congress, and that therefore the States may legislate in the absence of Congressional legislation, proceeds to define the kind of cases that come under the *third* class, *supra*—that is, cases wherein the jurisdiction of Congress is *exclusive*, and States have no power at all. On this subject the court says:

"But wherever such laws, instead of being of a local nature, and not affecting the interstate commerce but incidentally, are national in their character, the nonaction of Congress indicates its will that such commerce shall be free and untrammeled and the case falls within the *third* class of those laws wherein the jurisdiction of

Congress is exclusive. Brown *vs.* Houston, 146 U. S., 622; Bowman *vs.* Chicago, etc., R. R. Co., 125 U. S., 465. Subject to the exceptions above specified, as belonging to the *first* and *second* classes, the States have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the States."

The "*regulation of wharves, piers, and docks*, and *the policing of harbors*" come under the *second* class mentioned by Mr. Justice Brown in the above case.

Notwithstanding all these authorities, wherein the Supreme Court of the United States has declared over and over again that where State legislation regulating the navigable waters of the country comes in conflict with national legislation on that subject, that the national legislation must prevail, counsel for defendants in error in their brief, filed in the court below, page 12 (Record, 51), say:

"Now it will be noticed that in these cases the court generally decided in favor of the claims set up under State authority, because there had been no legislation by Congress inconsistent with that authority; and while what was said by the court as to the effect of future legislation by Congress is entitled to respectful consideration, it was all outside of the cases before the court and clearly *obiter*."

This statement, we respectfully submit to the court, evinces a great misapprehension, as it seems to us, of the questions before the court and decided by the court in the several cases referred to.

And counsel are clearly at sea, as it seems to us, in the further statement in their brief, immediately following, to this effect:

"Further, it will be noticed that the only case decided by the U. S. Supreme Court, since the Wilson case,

2 Peters, *supra*, as to the effect of such legislation after it has been enacted, is the case in 165 U. S." (Record 51, 52.)

A reference to the authorities we have cited, *supra*, will show that this statement is also the result of misapprehension.

Counsel for defendants in error, in their brief filed in court below (Record, 48), pp. 5 and 6, say:

"Now, to fix the harbor lines of the ports of the United States is a regulation of commerce, or it is not. If it is, then the power so to do is exclusively vested in Congress. If it is not, then the city of Portland has an indisputable right to say where the wharf lines in its harbor shall be."

This, we respectfully submit, in view of the overwhelming authorities we have quoted, *supra*, is not a correct statement of the law. The establishment of a harbor line in the waters of a navigable harbor within the limits of a single State may be, and as we confidently assert, is "*a regulation of commerce*," and yet it does not follow that the power to establish harbor lines in such a harbor is *exclusively vested in Congress*. Upon the contrary, the establishment of harbor lines in such a harbor, being a subject of *local* character, which only affects international and interstate commerce *incidentally*, it follows, in view of the many decisions of the Supreme Court of the United States, with none to the contrary, that until Congress acts and assumes jurisdiction of the waters of such a harbor, the State, or the city acting under authority from the State, may do so. But, when the National Government acts, then the power of the State to act ceases, and if a conflict between the action of the two jurisdictions arises, that of the State must give way to that of the General Government.

We do not claim by any means, nor is it necessary, at least so far as this case is concerned, that Congress has any power under the commercial clause to authorize the Secretary of War to determine as to size, length, height or character of any wharf or warehouses within the city of Portland, constructed on lands bordering on the Willamette river. Our claim is this: That Congress has the power under the commercial clause to authorize the Secretary of War to establish, locate and fix a certain harbor line, on either side of the harbor at Portland, up to which wharves, piers, warehouses, and other commercial aids may be constructed, and beyond which it shall not be lawful, *without the consent of Congress*, or *the Secretary of War* representing Congress, upon the part of the State, or any corporation or municipality authorized by the State, or any individual, person, company, association or corporation, to construct or build any wharf, pier or warehouse of any kind whatever. And we claim, furthermore, that this is precisely the power exercised by Congress in the river and harbor act of September 19, 1890.

Congress Authorizes the Secretary of War to Establish Harbor Lines.

III.

In accordance with the doctrine recognized by the foregoing authorities, Congress in the river and harbor act of August 11, 1888, as amended in the river and harbor act of September 23, 1890 (26 Statutes, 455), enacted a law, the twelfth section of which reads as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is

hereby authorized, to cause such lines to be established, *beyond which no pier, wharves, bulkheads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him;* and any person who shall willfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court for each offense." (Sec. 12, act 1890, 26 Stat., 455.)

This provision will be discussed fully later on in this argument.

Congress has jurisdiction over the navigable waters of a river lying wholly within the limits of a single State.

IV.

Under the commerce clause of the Constitution of the United States, Congress has jurisdiction over a navigable river connecting with the ocean, where the stream is wholly within a single State.

Gibbons *vs.* Ogden, 9 Wheat., 1.
Veazie *vs.* Moor, 14 How., 568.
Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 251.
Sillman *vs.* Hudson River Bridge Co., 2 Wall, 403.
Gillman *vs.* Philadelphia, 3 Wall., 713.
The Passaic Bridge, 3 Wall., 782.
Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.
Brown *vs.* Houston, 114 U. S., 622.

This doctrine was asserted by Chief Justice Marshall, in Gibbons *vs.* Ogden, 9 Wheat., 1824. The opinion says:

"But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a point within a State, *then the power of Congress may be exercised within a State.*"

What is a navigable water of the United States within the meaning of those terms as used in the legislation of Congress?

V.

What is meant, then, by "navigable waters of the United States?" They are waters navigable by licensed and enrolled and registered sea-going vessels, engaged in commerce upon the ocean with foreign nations, and with other States, and within the ebb and flow of ocean tides, although this, as to the tides, is not (since the decision of the United States Supreme Court in the case of the Genesee Chief (12 How., 443), essential, irrespective of the fact that such waters may extend far into the interior of any single State. Nor is it essential in order to bring rivers within this definition, that they should be navigable by sea-going vessels, provided they connect with waters so navigable, and are themselves navigable in fact for steamboats and other craft. That the Willamette river is such a stream cannot be questioned, and although some stress was laid upon this point by counsel in the circuit court, it seems to have been entirely abandoned in the argument in the Supreme Court of the State.

It is conceded by us that if this power upon the part of Congress to so control the navigable waters of the United

States, in regulating commerce with foreign nations in reference to these *local* matters, is permitted to lie dormant; in other words, if Congress has taken no action in regard to the control generally of these local matters in navigable waters, or of any particular navigable water, that then the jurisdiction and power to control such waters in these local matters wholly within the limits of the State, rest with the State. The authorities upon this point are uniform and conclusive.

If, however, Congress has asserted the full power referred to in regard to any of the navigable waters of the United States lying wholly within a State, and assumed full jurisdiction over the same, then the State has no power whatever to pass any act looking to the control of such waters which in any manner conflicts with the exerted power of the Federal Government. And any acts previously passed by the State which conflict with the legislation of Congress become immediately obsolete and inoperative.

Congress has taken jurisdiction of and legislated by both special and general acts relative to the waters of the Willamette river.

VI.

What are the facts, then, in reference to the case at bar, and with reference to the navigable waters of the Willamette river running through the city of Portland?

Prior to August 11, 1888, Congress had not asserted any general control over the waters of the Willamette river except by making appropriations from time to time for the improvement of its navigation. As clearly indicating, however, that Congress regarded these waters as subject to the control of Congress, separate and special acts of Congress were passed in relation to the construc-

tion of bridges over the Willamette river; these were passed prior to September 19, 1890.

The first was an act approved February 2, 1870, which gave consent to the city of Portland to erect a bridge from Portland to the east bank of the Willamette river, not obstructing, impairing, or injuriously modifying its navigation, and requiring that the city should first submit the plans of such bridge to the Secretary of War for his approval.

The second act was passed on the twenty-second day of June, 1874, which authorized the county commissioners of Marion county, or said commissioners jointly with those of Polk county, to build a bridge across the Willamette river at Salem, Ore., a distance of fifty miles further into the interior of the State than Portland.

The third act was passed June 23, 1874, which authorized the Oregon & California Railroad Company alone or jointly with the Oregon Central Railroad Company to build a railroad bridge across the Willamette river at the city of Portland, with a draw of not less than 100 feet in the clear on each side of the draw-abutment, and so constructed as not to impede the navigation of the river and allow free passage of vessels through the bridge.

These acts, as we have stated, were all of a *special* nature, and did not involve the assumption by Congress of general national police powers over the river.

In the river and harbor act, however, approved September 19, 1890 (see Supplement to the Revised Statutes of the United States, volume 1, pages 800–803), Congress enacted a general law, amendatory of the act of August 11, 1888, applicable to all the navigable waters of the United States, which, according to the definition heretofore given, included the navigable waters wholly within a State as well as those not within it.

In this act there were really embodied two separate and distinct acts or provisions—in the different sections, the one having no relation whatever to the other—the one having *sole* reference to the *construction of bridges*, and *works of like character*, and the other having *sole* reference to the *establishment by the Secretary of War of the harbor lines* of the various harbors in the United States, and providing beyond which no wharf, pier, bulkhead or other obstruction should be erected, *without permission from the Secretary of War*. Sections 4, 5 and 6, and a part of section 7 of this act relate mainly to the construction of bridges, while a portion of section 7 and section 12 relate exclusively to the establishment of harbor lines. (26 Stat. U. S., pages 453–455.)

It has been held by the Supreme Court of the United States in the case of The Lake Shore and Michigan Railway *vs.* The State of Ohio, 165 U. S., 365, that the provisions in sections 4, 5 and 7 of the act of September 19, 1890, above referred to, conferring upon the Secretary of War authority concerning *bridges over navigable waters*, did not deprive the States of authority to bridge such streams; that is, of authority to both *authorize* their construction, and under certain conditions, that is, after the plans for the same have been submitted to the Secretary of War, and approved by him, to *construct* the same, but simply created an additional cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce. This authority is quoted by the counsel for defendants in error in support of their contention in the case at bar.

We have no controversy with counsel in regard to the meaning of this decision of the Supreme Court of the United States in its application to the construction of bridges across navigable waters wholly within a State. A careful examination, however, of the act of 1890, and

a comparison of sections 4, 5, 6 and a part of 7 of that act relating to bridges (and which sections *only* were construed by the Supreme Court of the United States in 165 U. S., 365), with section 12 and part of section 7 of that act, which relate *solely to the establishment of harbor lines*, will show at a glance that the decision in 165 U. S. cannot have any possible bearing whatever upon the questions involved in the present controversy. In the one case—that is, in the legislation relating to bridges—it is perfectly clear, as stated by the Supreme Court in 165 U. S., that it was not the intention of Congress to deprive the States from legislating in regard to bridges over waters wholly within a State, but was only intended to give the Secretary of War supervisory control.

By section 4 it was provided—

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States, is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span or otherwise, or where there is difficulty in passing the draw-opening, or the draw-span of such bridge, by rafts, steamboats or other water craft, it shall be the duty of said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

While section 5 makes it a misdemeanor upon the part of the party, corporation, association or company notified if they fail to comply with the order of the Secretary of War, and upon conviction the party so failing is punishable by a fine not exceeding $5,000, and for every month such person, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, etc.

It is perfectly clear that these sections do not attempt to take from the State all control of the subject, while section 7, still relating to bridges, provides as follows:

"* * * and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War."

Here, again, while Congress exercises a *portion* of the power conferred by the commercial clause of the Constitution, it is manifest there is no expression of an intention upon the part of Congress to take from the States the power to authorize the construction of bridges over navigable waterways wholly within a State, but only to provide that after the erection of such bridges has been authorized by the State, the construction of the same shall not be commenced "*until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War.*" This legislation, therefore, relating to bridges, was only a *partial* exercise of the power which Congress *might have exercised*, but did not. Clearly, according to the weight of authority, Con-

gress, by a single line in the act, could have said—and constitutionally have said, under the power of Congress to regulate commerce—"from and after the passage of this act, no State shall exercise any control whatever in the construction of bridges or other works over or in any of the navigable waters of the United States wholly within a State." Congress, however, did not do this, in so far as it legislated in reference to bridges, hence the decision in the case of the Lake Shore and Michigan Railway *vs.* the State of Ohio, 165 U. S., cited by counsel, while undoubtedly good law has no application to Mr. Montgomery's case.

Mark the clearly defined difference between the provisions of the act of September 19, 1890, relating to the construction of bridges, and those of the same act authorizing the establishment of harbor lines. In the one case, the former, Congress only partially exercised the power conferred by the commercial clause of the Constitution, while in the latter the whole power was exerted.

VII.

The provisions, however, in the river and harbor act of September 19, 1890, relating to the establishment of *harbor lines*, are wholly and radically different. Here Congress exerted its *full constitutional power*, and, without any qualifications, limitations or conditions whatever, conferred upon the Secretary of War the full and unrestricted power "to cause the harbor lines to be established in any harbor, beyond which no piers, wharves, bulkheads or other works may be extended or deposits made, *except under such regulations as may be prescribed*

from time to time by him." That is, the Secretary of War.

These sections of the river and harbor act of September 19, 1890, relating to harbors, are *in hæc verba* as follows:

"SECTION 12. That section 12 of the river and harbor act of August 11, 1888, be amended and re-enacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized to, cause such lines to be established, beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, *except under such regulations as may be prescribed from time to time by him:*

"And any person who shall wilfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $1,000, or imprisonment not exceeding one year, at the discretion of the court, for each offense."

Supplement to Revised Statutes U. S., volume 1, page 803, 26 Stat., page 455.

While section 7 of the same act, and as amended by the act of July 13, 1892 (27 Statutes, 98–110) provides as follows:

"SECTION 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, *without the permission of the Secretary of War*, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters;

and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers, and abutments, causeway, or other works over or in any port, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the Legislative Assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, *unless approved and authorized by the Secretary of War.*

"*Provided:* That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw-bridge, bridge piers and abutments or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

Here, it will be observed, by section 12, *supra*, no power whatever is left to the State. The whole business of establishing harbor lines for harbors within the navigable waters of the United States, whether located wholly within a State or otherwise, was taken from the States and jurisdiction assumed by Congress.

Undoubtedly in a case where the Secretary of War has never acted, the State, through a municipal coporation or otherwise, might, prior to the passage of the above act of September 19, 1890, lawfully establish harbor lines for any harbor without consulting the Secretary of War, in reference to which all parties would be compelled by law to conform. These lines, however, if established, must give way, of course, to the superior authority of Congress, whenever the Secretary of War

does act, and any harbor lines established by the State or city, under authority from the State, must give way to those established by the Secretary of War.

In the case of the port of Portland, no action whatever had been taken, either by the city or port of Portland, establishing either harbor or wharf lines, prior to the action taken by the Secretary of War August 9, 1892.

Furthermore, since the passage of the act of September 19, 1890, *supra*, even though the Secretary of War may not have established any harbor lines at a given point, no person, association or corporation could, under any authority from a city or State, lawfully build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind in any of such navigable water of the United States in such manner as would obstruct or impair navigation, commerce or anchorage of such waters, *without first obtaining permission of the Secretary of War*. This, as we have said, in cases where the Secretary had established no harbor lines. This is clear from section 7 of the river and harbor act of September 19, 1890, as amended by the act of July 13, 1892, 27 Stat., 88–110, and under this provision it is clear that the Secretary of War may, in his discretion, in the interest of foreign, or interstate commerce, authorize the construction of a wharf *outside of established harbor lines*, even though such construction may to some extent obstruct or impair navigation, commerce or anchorage.

The following statement, therefore, in the brief of counsel for appellants in the court below, page 15: "We submit that said section 4 is as much of an assumption of *exclusive* control over *existing bridges* as section 12 is over *existing harbor lines*," is, in view of the foregoing analysis and comparison of the two sections, and of the decision of the Supreme Court in 165 U. S., not borne out by the facts.

The Secretary of War has authority to change and relocate harbor lines previously established by him.

VIII.

Counsel for appellants' *fourth* assignment of error in lower court (Appellants' Abstract of Record, 50) (Record, 44) reads as follows:

"Said court erred in holding that the Secretary of War had any right in 1898 to change the harbor lines that were established in 1892."

While subdivision II of the brief for appellants, page 20, is as follows:

"The Secretary of War had no right to change or relocate established harbor lines." (Record, 44.)

The law presumes that the Secretary of War in re-establishing the harbor line, September 23, 1898, acted within his jurisdiction.

19 Am. & Eng. Ency. of Law, 43, and authorities there cited.

And so far from anything in the record showing affirmatively that the Secretary did not act within the limits of his power, there is abundant proof to show that he did, as will be shown presently.

It is submitted that the observations of the learned counsel in brief filed in court below, and which will doubtless be repeated in brief filed here, on the word "*establishment*," to the effect that it relates exclusively to an "*inceptive and original act*" (Appellants' Brief, 9, (Record, 160), are hypercritical. Counsel say, "How can a thing be established that has been already established?" Webster defines the term "*establish*" as follows: "To enact or decree by authority; to decree; to enact; to ordain; said of laws, regulations and the

like." That is to say, we establish laws, we establish regulations, we establish things of like character. But who will contend that any law or regulation or the like must, unless it indeed be those of the Medes and Persians, remain *ex necessitate* forever unchangeable, because forsooth they were once *established*. Laws are changed, regulations are changed by the same authority that established them originally. In other words, laws are changed and re-established, regulations are modified and re-established.

Webster's Dictionary, Unabridged.
United States *vs.* Eliason, 16 Peters, 291.
United States *vs.* Romard, 89 Fed. Rep., 157.

In the case, *supra*, U. S. *vs.* Elliason, 16 Peters, 291, the Supreme Court of the United States, in considering the act of Congress of March 3, 1835, and the order of the War Department of March 13 of the same year, establishing certain rules and regulations for the government of the army, said:

"The power of the Executive to establish rules and regulations for the government of the army is undoubted. The power to establish *implies necessarily the power to modify or repeal or create anew*. The Secretary of War is the legal and constitutional organ of the President for the administration of the military establishment of the nation. The rules and orders publicly promulgated through him must be received as the acts of the Executive, and as such be binding upon all within the sphere of his legal and constitutional authority."

In Gratiot *vs.* United States, 4 Howard, 80, this court said:

"As to the army regulations this court has too repeatedly said that *they have the force of law* to make it proper to discuss or contend anew."

Upon the question as to the right and power of the Secretary of War to change and re-establish and relocate a harbor line in a harbor, after having once caused the same to be established, see the recent case of the United States *vs.* Romard, decided in the circuit court of the southern district of New York, August 4, 1898, 89 Federal Reporter, page 157, which is directly in point.

The act of Congress of June 29, 1888, as amended by the act of August 18, 1894, prohibited the deposit of refuse and other material within the harbor of New York and other waters within limits prescribed by the supervisor of the harbor. The court in passing upon this act held, *first*, that it did not unlawfully delegate any portion of the power of Congress over navigation and commerce, and, *second*, that the points at which the refuse might be deposited *might be changed from time to time by the supervisor*, the court says:

"Congress did not thereby delegate to the supervisor any of its power 'to regulate commerce,' and the included control of the navigable waters of the United States. The supervisor is not authorized to declare that dumping of refuse of various kinds is obstructive or injurious to navigation and punishable. He is merely directed to overlook the detailed operation of such dumping, to the end that the deposit shall not be harmful to navigation, with the same purpose *harbor masters are authorized to designate the place of anchorage of ships, and locate and shift locations as the conditions of shipping in the harbor require*. Obviously the two houses of Congress and the Executive could not take the immediate oversight of the dumping scows, directing the deposit in one place or another as the exigencies of the day or hour demanded, and no general law could meet the mischief sought to be avoided, and hence the mere detail of protecting the harbor was committed to a subordinate officer. It is erroneously suggested that the supervisor may declare what are obstructive and injurious deposits.

"The act does this, and the supervisor merely designates where such deposits may be made without obstructive and injurious effects. The shifting conditions necessitate shifting places of deposit, *so that in a sense what is innocent at one hour may be offensive at another.* But that is a mere matter of police regulation whereby a public officer is authorized to command scows using the harbor to adapt themselves to certain transitory conditions in the manner that may seem suitable to such officer. The act specifically provides that every scow shall be dumped only in the place or places indicated by the supervisor. *It would be strange if the United States with its power over navigable waters could not place a keeper over the same with power to decide what portion of its vast domain should receive the refuse of a great city where the propriety of selecting such portion depended on ever-changing conditions.* Such a power cannot be denied to it in the present instance as it would defeat the only practical and available means of protecting from nuisances the waters under its jurisdiction, and this may be by a sweeping enactment prohibiting all deposits in the harbor and within a certain distance thereof."

United States *vs.* Romard, 89 Fed. Rep., 157.

This case of Romard, *supra*, is directly in point, not only upon the power of Congress to authorize the Secretary of War to establish harbor lines, but also upon the question as to his power to change and relocate such lines.

The demands of foreign commerce may at certain times and in certain places demand that the riparian owner shall be permitted to-day to extend his wharf outside of the harbor line established ten years ago. There may be a change in the current of the stream, as is not infrequently the case, from one side of the river to the other, making it impossible for ships to connect with wharves on the old line, and thus Congress, in the exercise of the power conferred by the commercial clause, has wisely provided for just such cases.

The Secretary of War has authority under Sections 7 and 12, Act 1890, to give respondent permission to extend his wharf beyond the harbor line established by him August 9, 1892.

IX.

By sections 7 and 12 of the river and harbor act of September 19, 1890, the Secretary of War is clothed with power to authorize the construction of a wharf *outside* of an established harbor line. (See quoted sections, *supra.*)

Sections 7 and 12, act 1890, 26 U. S. Stat., 454–455. 27 U. S. Stat., 110.

This inhibition in section 7, *supra*, against building outside the established harbor line "without the permission of the Secretary of War" is the equivalent of a legislative declaration—

First. That the Secretary of War may in his discretion make an order permitting the building of a wharf outside of such line, and

Second. That with such permission a wharf may be lawfully constructed, either in whole or in part, *outside* of such line.

And this view is confirmed by a clause of section 12 of same act, which after providing that the Secretary of War may cause harbor lines to be established, concludes as follows: "Beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, *except under such regulations as may be prescribed from time to time by him" (the Secretary of War).* And then the same section declares that any person wilfully violating any of the provisionsof that section, "*or any rule or regu-*

lation made by the Secretary of War in pursuance of this section," shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding $1,000.00 and imprisonment not exceeding one year at the discretion of the court for each offense.

Sec. 12, act Sept., 19, 1890; 26 U. S. Stat., 455.

If then, the Secretary of War has the power, as we confidently insist he has, to permit a wharf or pier to be extended *outside* of a harbor line established by him in pursuance of an act of Congress passed in the execution of the power conferred by the commercial clause of the Constitution, and if in the exercise of such power he has made an order permitting it, what right, we inquire, has the State or any municipality, acting under authority from the State, to say such wharf shall *not* be so built? What voice shall be obeyed, that of the *nation* or that of the *municipality*?

Counsel for appellants in their brief filed in the Supreme Court of the State, pages 24–25, contend that by fair construction of section 7, act of 1890, *supra*, "that the States and individuals may do anything *inside* of harbor lines, or where there are no harbor lines, which does not "impair the navigation, commerce or anchorage of such waters.'" (Appellants' brief, 24–25.) (Record 59.)

But this certainly cannot be so, as this section 7 must be considered in connection with section 12 of the same act, which, after authorizing the Secretary of War to cause harbor lines to be established, says, referring to such lines:

"Beyond which no piers, wharves, bulkheads or other works shall be extended, or deposits made, *except under such regulations as may be prescribed from time to time by him* (the Secretary of War)."

This, it will be observed, is a positive inhibition against

individuals, cities and States, and the whole world. No one can extend or authorize the extension of any pier or wharf, beyond the harbor line thus established by the Secretary of War, *except under such regulations as may be prescribed by the Secretary of War*. And is it not clear beyond all controversy, if Congress has, in pursuance of the commercial clause, authorized the Secretary of War to *grant permission* to a riparian owner to extend his wharf *outside* the established harbor line, that the State has not the power to prevent such owner from extending his wharf *inside to* such established harbor line? If the State can do this then it can clearly defeat all action under the Federal authority, and completely nullify the act of Congress.

X.

Section 6 of the act of September 19, 1890, *supra*, makes it unlawful to—

"cast, throw, empty or unload, or cause, suffer, or procure to be cast, thrown, emptied or unladen, either from or out of any ship, vessel, lighter, barge, boat or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river or navigable waters of the United States, which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods or otherwise, whereby navigation shall or may be impeded or obstructed."

This section provides further as follows:

"Provided, that nothing herein contained shall extend, or be construed to extend, to the casting out, unloading, or depositing of any material excavated for the improvement of navigable waters into such places and in such manner as may be deemed by the United States officer supervising said improvement most judicious and practicable, and for the best interests of such improvements, *or to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is hereby authorized to grant, in any place designated by him where navigation will not be obstructed thereby.*"

Now, suppose the Secretary of War, in pursuance of the authority conferred by this section, should designate some particular point or points in the navigable waters of the harbor of Portland for the dumping of the substance mentioned in the foregoing statute, and suppose subsequently to such designation by the Secretary of War the city or the port of Portland should designate a certain other point or points where such matter could be dumped, and a conflict should arise between the Federal and State governments. Would this court for one moment hold that the action of the city or the port of Portland should be sustained? Most certainly not.

What is the effect of the action of the Secretary of War in controlling harbor lines?

XI.

Now, what is the effect of this legislation, sections 7 and 12, act of September 19, 1890, in relation to the establishment of harbor lines in harbors and of the action of the Secretary of War thereunder? Unquestionably, the purposes of such legislation being kept in view, namely, to protect harbors from encroachment, facilitate navigation and anchorage of vessels, etc., the true con-

struction of this legislation is this: It says in substance and legal effect to all concerned—property-owners, navigators, shippers, warehousemen, wharfingers, States, towns, cities, municipalities, citizens—"Here are the established harbor lines of this harbor. These lines are established by the Secretary of War under and in virtue of a law of the United States, enacted in pursuance of the constitutional grant of power to Congress to regulate commerce with foreign nations. Up to this line from the shore such structures, in the shape of wharves piers, warehouses, etc., as the riparian proprietor may, as such riparian proprietor, lawfully erect, may be erected." In other words, "every right which attached to the riparian proprietor, with reference to the construction of wharves, piers, warehouses, etc., may be exercised by him up to this line. Beyond this line, however, such riparian proprietor or any other person, shall not be permitted to go, *except* (here again is indicated the intention of Congress to assume absolute control in the matter of the location of wharves, or rather as to the limit within which they may be erected) *under such regulations as may be prescribed from time to time by him*" (the Secretary of War). In other words, it may be lawful to erect a wharf, pier, bulkhead or other works even *beyond this harbor line*, provided it is done as provided in section 12 of said act, under such regulations authorizing him to do so as may be prescribed from time to time by the Secretary of War, *or* if the *permission of the Secretary of War* is first obtained as provided in section 7 of said act.

Counsel for appellants in their brief, page 12, in lower court comment on the terms "*prescribe*" and "*regulations*," and insist that as used in section 12 of the act of 1890, *supra*, the term "*regulations*" means rules which only become operative *after they are written out and published*.. We quote from the brief:

"The regulations referred to are to be '*prescribed.*' To '*prescribe*' means to write beforehand. The word '*regulations*,' as here used, evidently means rules for the management of harbors *to be written out and published before they take effect!*"

We can not believe this to be the correct interpretation of these terms as used in section 12, *supra*, but insist that the clause, taken as a whole, "except under such regulations as may be prescribed *from time to time* by him," means and was intended to mean simply this: That whenever a natural person or a corporation or municipality shall make application to the Secretary of War for permission to extend a pier, wharf, bulkhead or other works, or to make a deposit, beyond the established harbor line, that the Secretary will then examine such particular case and either grant or refuse it; and in case he grants the permit, then to attach such conditions by prescribing such regulations as would in such case seem to be proper and reasonable.

This view is supported by the use of the words "*from time to time;*" that is, from time to time as each application is presented the Secretary shall prescribe the regulations which shall govern that case. A regulation that would be proper and applicable to one case might be wholly improper and inapplicable in another, or indeed in many other cases.

In the case of Mr. Montgomery's application the Secretary *prescribed* the precise distance, varying from less than twelve feet at one end to considerably less than eighty feet at the other end, and eighty-five feet at one intermediate point, which he should be permitted to extend his wharf beyond the harbor line as established August 9, 1892.

But a still further and conclusive answer can be made to the suggestions of counsel in their brief just quoted. It

is perfectly clear that if the Secretary of War has power to grant a permit to extend a wharf beyond the established harbor line, coupled with a power to prescribe from time to time regulations governing the same, then he has the power, should he in any given case believe that no regulation is necessary, to grant the permit without prescribing *any* regulation. Conceding counsel's construction, therefore, of the clause to be correct, and conceding further that no such rules were ever prescribed beforehand and published, still the action of the Secretary in granting a permit, in the absence of any such regulations, would be binding.

Harbor lines were established at the port of Portland by the Secretary of War, August 9, 1892.

XII.

In pursuance of the twelfth section of the act of September 19, 1890 (26 Statutes of the U. S., 455, *supra*), the Secretary of War on August 9, 1892, caused the harbor lines on both sides of the Willamette river in the port of Portland to be established.

Bill of complaint, Appellant's Abstract of Record, 2, in court below. Respondent's answer (Appellant's Abstract of Record, 17–18), in which this fact is averred, and the same is not denied, in fact, appellant's counsel concede this line was so established at that date. (Record, 16 and 22.)

The Acts of Acting Secretary Meiklejohn are those of the Secretary of War.

XIII.

By the act of March 15, 1890, provision was made for the appointment of an Assistant Secretary of War, to be

appointed by the President by and with the advice and consent of the Senate.

Supplement to the Revised Statutes U. S., vol. 1, second edition, page 707.

Section 177 of the Revised Statutes, page 22, provides as follows:

"In case of the death, resignation, absence or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President * * * perform the duties of such head until his successor is appointed, or such absence or sickness shall cease."

The Secretary of War on September 23, 1898, gave the respondent, Montgomery, permission to extend his wharf outside the harbor lines established by him August 9, 1892, and also at the same time the Secretary changed the location of the said line and re-established it.

XIV.

In pursuance of these provisions of sections 7 and 12, *supra*, the respondent Montgomery on May 21, 1898, (Abstract of Record, 35) made application to the Secretary of War for an order permitting him to extend his wharf a certain clearly defined and accurately described distance, in length and width, *outside* the harbor line established by the Secretary of War August 9, 1892, (Abstract of Record, 31); and also praying that the harbor line thus established be relocated and re-established on a certain line also clearly defined and designated in such application. (Abstract of Record, 35.) (Record, 6–11.)

Subsequently, on September 23, 1898, the said appli-

cation of the respondent Montgomery was in all respects granted by the then acting Secretary of War, G. D. Meiklejohn, by the following endorsement on said application:

"Ninth endorsement.

"WAR DEPARTMENT, *September 23, 1898.*

"In accordance with the views of the Chief of Engineers the request of Mr. James B. Montgomery will be complied with.

"[Signed] G. D. MEIKLEJOHN,
"Acting Secretary of War."

And also on the same date said acting Secretary made the following endorsement upon the map accompanying and a part of such application:

"WAR DEPARTMENT, *September 23, 1898.*

"The change in harbor line shown in red hereon is approved.

"[Signed] G. D. MEIKLEJOHN,
"Acting Secretary of War."

Findings of fact, Abstract, 41–42. (Record, 6–11.)

By these two orders, therefore, of the acting Secretary of War, *both* of the things prayed for by Mr. Montgomery were granted, namely:

First. Permission to construct his wharf in part *outside* of the harbor line established August 9, 1892, and

Second. The harbor line was relocated and re-established in front of the property of the respondent Montgomery, on the line as prayed for in his application.

Findings of fact, Abstract of Record, 42–43. (Record, 6–11.)

And the respondent is constructing his wharf wholly *inside* of the harbor line thus established by the Secretary of War, and in accordance with the *permission* given him by the Secretary of War.

Should we, therefore, for the present and for the sake of the argument, concede the contention of counsel for appellants, that the Secretary of War has no power to change, or re-establish a harbor line once established by him, the respondent, Montgomery, had by virtue of these two orders of the Secretary of War his *permission* to extend his wharf *outside* of the harbor line as originally established August 9, 1892, and as authorized by said sections 7 and 12, *supra*, of the act of September 19, 1890.

See number sixth finding of fact, Abstract of Record, 35–36. (Record, 6–11.)

See also original application of respondent, Montgomery, of date May 21, 1898, on file as evidence in this case. (Record, 26–28.)

Respondent's fifth assignment of error in the court below is not well founded.

Appellants' fifth assignment of error (Appellants' Abstract of Record, 50) reads as follows: (Record, 6–11.)

"Said court erred in holding that the facts as they appear in the pleadings and evidence gave the Secretary of War, or G. D. Meiklejohn, any jurisdiction to fix, or interfere with the harbor lines within the city of Portland."

A careful inspection of the pleadings will show that this assignment is not well founded. By a reference to the appellants' abstract of record, it will be seen that the sixth finding reads as follows (Appellants' Abstract of Record, 50) (Record, 6–7):

"That on or about May 21, 1898, the defendant, James B. Montgomery, presented his petition to the Secretary of War, in which he claimed that said harbor line, established August 9, 1892, in front of water lots 1,

2, 3, 4, 5, 6 and 7, was located too far *inland*, and at many points in water only six inches to two feet in depth, and *praying that said line in front of said lots, and for the distance as hereinafter particularly described should be relocated.* That the Secretary of War, on receipt of said application of the defendant, Montgomery, directed that a public hearing be had on the subject before Major W. L. Fisk, major corps of engineers, U. S. A., at Portland, Oregon, with the view of ascertaining whether such change in said harbor lines as prayed for by defendant, and whether his prayer for permission to extend his wharf beyond the harbor line established August 9, 1892, should be granted. That such public hearing was had by Major Fisk on August 5, 1898, and pending which the petition of the defendant, Montgomery, was on the seventh day of August, 1898, amended by him at the written request of Major W. L. Fisk, major corps engineers, U. S. A., so as to more definitely describe the change in the harbor line asked for, which amendment was embodied in a communication from the defendant, James B. Montgomery, of which the following is a copy:

"PORTLAND, OREGON, *August* 17, 1898.

"To Major W. L. Fisk, corps of engineers, in charge of river and harbor improvements.

"DEAR SIR: In reply to your letter asking for a definite location of the change in the established wharf line in front of my property in Albina, as desired by me, I would state as follows, viz:

"I respectfully ask that the established wharf line be *relocated* according to the following description:

"The prolongation northward of the present established wharf line, from the center line (produced) at Knight street, and the center line (produced) of Randolph street, to an intersection of a prolongation southward of the present established wharf line along the face of the Northern Pacific Terminal Company's dock or wharf, from the intersection of said line with the center line of Russell street (produced).

"Very respectfully yours,

"J. B. MONTGOMERY."

(Record, 7.)

Thus, it will be seen, everything essential to the jurisdiction of the Secretary of War was brought to his attention and made a matter of record before him.

This application, moreover, it will be seen by the court, was in its claims twofold in character:

First. A relocation, or establishment of the harbor line at the points indicated was prayed for, and reasons for the same were presented, showing clearly that it was for the true interests of the harbor of Portland that such change in the location of the harbor should be made, as it must be apparent to all that a harbor line along a navigable ship harbor which is located in water from only six inches to two feet in depth, was not properly located, the best interests of the harbor being considered; and

Second. The defendant, Montgomery, in this application, prayed *for permission to extend his wharf beyond the harbor line established August 9, 1892*, to a line definitely described and indicated by him in his letter to Major W. L. Fisk of August 17, 1898, as requested by Major Fisk.

Will it be seriously contended that this petition *supra* did not show clearly and conclusively on its face that the harbor line as established August 9, 1892, was located entirely too far landward, the preservation and protection of the harbor being considered? And is it not a fact, furthermore, that the petition of Mr. Montgomery distinctly prayed for a *relocation* of the harbor line at said point? What more could have been said in order to bring the subject properly before the Secretary of War? And in view of the fact that the Secretary, instead of acting summarily upon said application (sixth finding of fact, Appellants' Abstract of Record 36) (Record, 6–7) "directed that a public hearing be had on the subject before Major W. L. Fisk, major, corps engi-

neers, U. S. A., at Portland, Oregon, with the view of ascertaining *whether such change in said harbor lines as prayed for by defendant,* and whether his prayer, *for permission to extend his wharf beyond the harbor line established August* 9, 1892, *should be granted;*" and in view of the further fact (sixth finding of fact, Appellants' Abstract of Record, 36) "that such public hearing was had by Major W. L. Fisk, on August 5, 1898;" and of the further fact that "the public were invited, and at which were a number of the leading business men of the city of Portland, interested in the preservation and protection of the harbor of Portland, and whose views, opinions, and protests were received in writing by Major Fisk, and all of which, together with evidence submitted by Mr. Montgomery with his report, were forwarded to the Chief of Engineers of the War Department, the report of Major Fisk being adverse to such change;" and in view of the further fact "that subsequently, on September 1, 1898, John M. Wilson, brigadier general, Chief of Engineers, U. S. A., made a thorough review of the report of Major Fisk, and transmitted to the Secretary of War the papers in the case" (sixth finding of fact, Appellants' Abstract of Record, 35–37) (Record, 6–7); we say, in view of all these things, and of the final decision made by the Secretary of War granting the prayer of the petition of the respondent in all respects, can it rightfully be said that the pleadings and evidence show affirmatively that the Secretary of War had no jurisdiction to change the established harbor lines (Appellants' Brief, 2), *or* that the *facts* before the Secretary were not sufficient to clothe him with jurisdiction to act as provided in the twelfth section of the act of 1890, *supra?* We confidently submit this court will not undertake to review the action of the Secretary of War, much less to hold that he had no jurisdiction in the premises.

Our Contention.

XVI.

Our contention, therefore, is, in view of what we have said:

First. That the defendant Montgomery has a perfect right to construct his wharf at the place and in the manner he is constructing it, such work being wholly *inside* the harbor lines as re-established and located by the Secretary of War on the twenty-third day of September, 1898; and not any further beyond low-water mark than is *necessary and convenient* for the use and accommodation of vessels navigating said harbor. (Sec. 4227, Hill's Code.) And in strict accordance with the permission granted him by the Secretary of War; and

Second. Though there had been no change in the location of the harbor line at that point by the Secretary of War, and conceding for the argument that the harbor line as established by the Secretary of War on August 9, 1892, is the correct one, even then the Secretary of War had jurisdiction and power under the law (sections 7 and 12, river and harbor act of September 19, 1890) to authorize Mr. Montgomery to construct his wharf *beyond said line*, and this permission has been given by the Secretary of War on Mr. Montgomery's application. Therefore, in any event, or upon any construction of the recent action of the Secretary of War, Mr. Montgomery has authority under and in virtue of the act of Congress just cited, and of the action of the Secretary of War, and of section 4227 Hill's Code, to construct his wharf at the place and in the manner he is constructing it, and neither the State of Oregon, the city of Portland, nor the port of Portland has any jurisdiction or right whatever, either through the courts or otherwise, to restrain or interfere with the construction thereof.

Counsel for defendants in error cite the case of Illinois Central R. R. Co. *vs.* State, 146 U. S., 387. But it is not believed that anything decided in that case can give support to any one of the propositions involved in their contention. The principal question involved in that case was as to the precise character of the ownership of the State in lands under the navigable waters of the great lakes, the court dividing. A majority of the court holding that the title to such lands which the State holds, is one held in trust for the people of the State, that they may enjoy the navigation of the waters and carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties, and that it is therefore a title different in character from that which the State holds in lands intended for sale. While the minority of the judges dissenting—Justices Shiras, Gray and Brown—held to the doctrine that the ownership of the State in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant, is as full as such ownership and power to grant in the case of the other public lands of the State. This was the great overshadowing controversy in that case. Of course there were a number of other incidential questions, but we are unable after a careful examination to find that anything decided in that case can be of any avail to the defendants in error in the suit at bar.

The twelfth section of the river and harbor act of September 19, 1890, authorizing the Secretary of War to establish harbor lines, is constitutional.

XVII.

As bearing upon the question of the power of Con-

gress to confer upon the Secretary of War the powers conferred by the twelfth section river and harbor act of September 19, 1890 (26 U. S. Stat., 455) we submit the following propositions:

It is true that the sovereign power to make national laws is vested in Congress, and as a general rule it is a settled maxim in constitutional law that this power can not be delegated, that is, that "power to whose judgment, wisdom and patriotism this high prerogative has been entrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved." (Cooley, Constitutional Limitations, 137.)

But this rule, however, applies only to powers which are *strictly* and *exclusively* legislative, and there is a wide range of subjects which may be regulated by direct legislation, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

See remarks Chief Justice Marshall, Wayman *vs.* Southard, 10 Wheat., 43.

It is, therefore, upon this principle that the provision of the judiciary act, which empowered the Federal courts to adopt rules of practice and forms of procedure, is held to be a valid delegation, although the discretion conferred is *quasi* legislative.

Wayman *vs.* Southard, 10 Wheat., 43.
Southerland St. Const., sec. 68.

So the power of the Secretary of War to prescribe rules and regulations for governing the army, and like authority in the Secretary of the Navy over his department, have been sustained, and within their sphere of action the regulations have the "*force of law.*"

U. S. *vs.* Eliason, 16 Peters, 291.
Gratiot *vs.* U. S., 4 How., 80.

Smith *vs.* Whitney, 116 U. S., 167.
Tilley *vs.* Railroad Co., 5 Fed. Rep., 641.
Railroad Co. *vs.* Dey, 35 Fed. Rep., 866.
In re Griner, 16 Wis., 447.
U. S. *vs.* Ormsbee, dist. ct., southern dist. Wis., May 9, 1896, 74 Fed. Rep., 209.

While the legislature cannot delegate its power *to make a law*, it can make a law to delegate a power *to determine some fact or state of things*, upon which the law makes, or intends to make, its own action dependent.

Field *vs.* Clarke, 143 U. S., 649–693.
Locke's Appeal, 72 Penn. St., 491.

The following authorities fully support the proposition that Congress had a constitutional right to confer upon the Secretary of War the powers and duties prescribed by the river and harbor act of September 19, 1890.

United States *vs.* Eliason, 16 Peters, 301.
Gratiot *vs.* United States, 4 How., 80.
Tilley *vs.* Railroad Co., 5 Fed. Rep., 641.
Railroad Co. *vs.* Dey, 35 Fed. Rep., 866.
In re Griner, 16 Wis., 447.
United States *vs.* Ormsbee, U. S. dist. ct., southern dist. Wis., decided May 9, 1897, 74 Fed. Rep., 209.
Miller *vs.* Mayor of New York, 109 U. S., 385.
United States *vs.* City of Moline, U. S. dist. ct., northern dist. of Ill., 82 Fed. Rep., 596.
United States *vs.* North Bloomfield Gravel Mining Co., U. S. cir. ct., northern dist. of Cal., 81 Fed. Rep., 253.
United States *vs.* Romard *et al.*, 89 Fed. Rep., 156.
Fallbrook Irrigation Dist. *vs.* Bradley, 164 U. S., 112.
United States *vs.* Romard *et al.*, 89 Fed. Rep., 156.

In the case of Miller *vs.* Mayor, etc., of New York, 109 U. S., 385, the question as to the constitutional power of Congress to confer upon the Secretary of War the duties, or similar duties, to those conferred upon him by the river and harbor act of September 19, 1890, came up for consideration by the Supreme Court of the United States.

In that case, Congress had passed an act (15 Statutes U. S., 336) authorizing the construction of a bridge over the East river, between the cities of New York and Brooklyn, and declaring that when completed it should be a lawful structure, etc. The second section was as follows:

"That the Secretary of War is hereby authorized and directed, upon receiving the said plan and map and other information, and upon being satisfied that a bridge built on such a plan and at said locality will conform to the prescribed conditions of this act, not to obstruct, impair or injuriously modify the navigation of said river, to notify said company that he approves the same, and upon receiving such notification such company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But until the Secretary of War approve the plan and location of said bridge, and notifies said company of the same in writing, the bridge shall not be built or commenced; and should any change be made in the plan of the bridge during the progress of the work thereon, such change shall be subject likewise to the approval of the Secretary of War."

It was contended by the plaintiff in that case, who sought to restrain the building of the bridge, that Congress could not leave it to the Secretary of War to determine whether the proposed construction would be an obstruction to the navigation of the river, but the court answered in this language:

"By submitting the matter to the Secretary, Congress

did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the Secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of the legislative will, must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. South Carolina *vs.* Georgia, 93 U. S., 13."
Miller *vs.* Mayor, etc., New York, 109 U. S., 393.

The Supreme Court of the United States in Fallbrook Irrig. Dist. *vs.* Bradley, 164 U. S., 112, said:

"Legislative power is not delegated by enacting conditions upon the performance of which the irrigation district shall be regarded as organized within the boundaries fixed by a board of supervisors after a hearing and vote of electors therein in favor of the incorporation."

It was said by the supreme court of the State of Indiana, in State *vs.* Gerhardt, 145 Ind., 439 (44 N. E. Rep., 469):

"That an act allowing a majority of voters of a township or ward by a remonstrance to prevent the granting of licenses to sell intoxicating liquors, is not unconstitutional as permitting them to suspend the operation of a general law."

The river and harbor act of September 19, 1890, conferring certain powers on the Secretary of War, has been held to be constitutional by Judge Grosscup, in the circuit court of the United States for the northern district of Illinois.

In the case *supra* of the United States *vs.* City of Moline, 82 Federal Reporter, 596, *supra*, Judge Grosscup, after citing the case of The United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178, where it was held that inasmuch as the bridge had been fixed by an act of Congress, and was therefore a lawful structure, it was not within the power of Congress to delegate to the Secretary of War power to change such status, but that such power to change, whatever it might be, was exercisable only by Congress itself, and the case of The United States *vs.* Rider, 50 Federal Reporter, 406, where the court (Judge Sage) held that the notice given to provide a draw-span in the bridge was unreasonable, *held* that the river and harbor act of September 19, 1890, conferring power and imposing certain duties upon the Secretary of War, is constitutional.

In the case of Chicago & Northwestern Railway Co. *vs.* Dey *et al.*, railway commissioners, the circuit court of the United States for the southern district of Iowa, held:

"That the provisions of the act of the Iowa legislature of April 5, 1888, to regulate railroad corporations and other common carriers, and to increase the powers and further define the duties of the State board of railroad commissioners, and to prevent and punish extortion and punish unjust discriminations, which authorizes said board to make and enforce a schedule of rates for railroad charges, are not unconstitutional as an attempted delegation of legislative power."

Chicago & Northwestern Railway Co. *vs.* Dey, 35 Fed. Rep., p. 866.

In a still later case, that of the United States *vs.* Romard *et. al.*, circuit court for the southern district of New York, decided August 4, 1898, 89 Fed. Rep., 156, the court held that the act of Congress of June 22, 1888, as amended by the act of August 18, 1894, which prohibits the deposit of refuse and other material within the harbor of New York and other waters, within limits prescribed by the supervisor of the harbor, and which commands that such material be deposited only within limits defined in a special permit, does not unlawfully delegate any portion of the power of Congress over navigation and commerce. The court in that case, after referring particularly to the facts and the law as applicable, said:

"With the same purpose, harbormasters are authorized to designate the place of anchorage of ships, and locate and shift locations as the conditions of shipping in the harbor require. Obviously, the two Houses of Congress and the Executive could not take an immediate oversight of the dumping of scows, directing the deposit in one place or another, as the exigencies of the day or hour demanded, and no general law could meet the mischief sought to be avoided; hence the mere detail of protecting the harbor was committed to a subordinate officer."

To the same effect are the following cases:

State *vs.* Railroad Co., 37 N. W. Rep., 782.
State *vs.* Railroad Co., 35 N. W. Rep., 118.
Tilley *vs.* Railroad Co., 5 Fed. Rep., 641.
Stone *vs.* Trust Co., 116 U. S., 307.
State *ex rel. vs.* George, 22 Oregon, 142.

The following cases having reference to the powers of the Secretary of War to makes rules and regulations in regard to the army and the management of canals, are analogous, instructive, and conclusive.

In case *In re* Griner and others, 16 Wisconsin, 447, the supreme court of that State held that an act of Congress giving the President power to make all necessary rules and regulations to carry into effect the law for calling out the militia is not a delegation of the legislative power of Congress, the court saying:

"The making by the President of rules and regulations for calling forth and drafting the militia is not an exercise of a power *strictly* and *exclusively* legislative. A distinction exists between those important subjects which must be entirely regulated by Congress, and those of less necessity, in reference to which a general provision made and power is given to those who act under it to fill up the details as incidental to its execution.

In the case of The United States *vs.* Ormsbee, 74 Fed. Rep., 209, the district court of the United States for the southern district of Wisconsin, held May 9, 1896:

"That the grant by Congress by the act of August 17, 1894, to the Secretary of War, of authority to proscribe such rules and regulations for the use, administration, and navigation of canals, etc., owned or operated by the United States, as in his judgment public necessity may require, *was not invalid as a delegation of legislative power;* and the

rules made pursuant thereto have the force of law, so that persons violating the same by drawing off water from the canal are subject to criminal punishment under the provisions of the same act."

There are on the statute books to-day almost innumerable cases of Congress conferring upon the Secretary of War powers very similar to that conferred by the twelfth section of the act of 1890, *supra*. For instance, in the deficiency act of March 9, 1891 (26 U. S. Statutes at Large, pages 800–868), there is the following provision:

"That the action of the Commissioners of the District of Columbia in heretofore granting permits for the extension of any building or buildings, or any part or parts thereof, in the city of Washington, in the District of Columbia, *beyond the building line*, and upon the streets and avenues of said city, is hereby ratified, without prejudice, however, to the legal rights of the Government in the event of destruction by fire, or otherwise, of any such structure. And hereafter no such permits shall be granted, except upon special application, and with the concurrence of all of said Commissioners *and the approval of the Secretary of War*."

By this section, therefore, the whole power for issuing permits for any building *beyond the established building line* is vested in the Secretary of War. This is but one of many very similar acts that might be cited.

Again, by section 4 of the river and harbor act of August 17, 1894 (Supplement to the Revised Statutes of U. S., vol. 2, page 250), it is provided as follows:

"SECTION 4. That it shall be the duty of the Secretary of War to prescribe such rules and regulations for the use, administration and navigation of any or all canals, and similar works of navigation, which now are, or hereafter may be owned, operated or maintained by the United States, as in his judgment public necessity may require. Such rules and regulations shall be posted in conspicuous and appropriate places for the information

of the public, and every person and every corporation which shall knowingly and wilfully violate such rules and regulations, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding $500, or by imprisonment in the case of a natural person, not exceeding six months, in the discretion of the court."

This is the section held to be constitutional in U. S. *vs.* Ormsbee, 74 Fed. Rep., *supra*.

Another illustration in point is the act of March 1, 1893, to create the California debris commission and regulate hydraulic mining in the State of California.

Supplement to the U. S. Revised Statutes, vol. 2, pp. 95–100.

This act further shows the extent to which Congress legislates upon the subject of navigable waters of the United States.

Respondent's Authorities Reviewed.

XVIII.

Counsel insist (Brief for Appellants, page 1, filed in lower court) that section 12 of the act of Congress of 1890 (27 Statutes, 88), is unconstitutional, and in support of this contention cite the following authorities:

Article X, amendments to the Constitution.

United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178.

U. S. *vs.* Rider, 50 Fed., 406.

County of Mobile *vs.* Kimball, 102 U. S., 699, 702.

Gilman *vs.* Philadephia, 3 Wall., 726.

Willamette Bridge Co. *vs.* Hatch, 125 U. S., 1.

Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.

U. S. *vs.* Bailey, 1 McLean, 240.

Mining Debris cases, 9 Sawyer, 497.

We will carefully consider each of these authorities and their bearing respectively upon the propositions submitted.

It is conceded, of course, that in virtue of the tenth amendment to the Constitution of the United States, all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people. Upon this proposition there can be no controversy between counsel and ourselves.

Now as to the case of The United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178, a careful examination of that case will develop the fact that the question involved was simply this: That where Congress has authorized the construction of a bridge over navigable waters of the United States, the same to be constructed according to certain plans, and a certain height, and with certain spans, and the same *has been so constructed*, that then a subsequent general act of Congress authorizing the Secretary of War to declare bridges to be an obstruction to navigation, and authorizing him to direct a change in their construction, or their total removal, to be followed by a penalty after notice in the case of refusal, *cannot apply to a bridge so previously constructed under a specific act of Congress.*

The decision of the court in that case was not to the effect, as stated by counsel in their brief, that the act of Congress of 1888 conferring these powers upon the Secretary of War was unconstitutional, but was simply to the effect that the act did not apply to a case where the bridge had been previously constructed in strict accordance with the plans and specifications authorized by a specific act of Congress.

The authority, therefore, it will be seen at a glance, has no possible bearing upon the question as to the constitutionality of the twelfth section of the act of Congress of 1890 now under consideration.

The decision in the case of United States *vs.* Rider, next cited by counsel in their brief in support of the unconstitutionality of the act of 1890 (50 Fed. Rep., 406), is based wholly upon the case of United States *vs.* Keokuk & H. Bridge Company, 45 Fed. Rep., *supra*, and is in all respects a parallel case, except that the bridge in this latter case sought to be interfered with had been constructed previously by virtue of a grant from the State of Ohio under an act of the legislature of that State of March 25, 1870, the bridge being over the Muskegon river. The extent of the holdings in the two cases being simply that the authority conferred upon the Secretary of War did not authorize him to interfere with bridges *then legally constructed*.

The next case cited by counsel in support of the unconstitutionality of section 12 of the act of 1890, is that of the county of Mobile *vs.* Kimball, 102 U. S., 691. This case, like the other, not only has no possible bearing upon the question of the constitutionality or unconstitutionality of the twelfth section of the act of 1890, but is a case directly in line in support of the contention of the plaintiff in error in this case; the court holding in that case, opinion by Mr. Justice Field, that the power conferred upon Congress by the commerce clause of the Constitution is *exclusive*, so far as it relates to matters within its purview, which are *national* in their character and admit of, or require *uniformity of regulation affecting all the States;* that that clause of the Constitution was adopted in order to secure such uniformity against discriminating State legislation.

The court held further that commerce with foreign

countries and among the several States, strictly construed, constitutes intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities, and to regulate it as thus defined there must be only one system of rules applicable alike to the whole country, which Congress alone can prescribe. That Congress by its non-action in such matters virtually declares that for the time being, *and until Congress deems fit to act*, the State may legislate touching matters *either local* in their nature or operation, or intended to be *mere aids to commerce*, for which special regulations can more effectually provide, such as harbor pilotage, beacons, buoys, and the improvements of harbors, bays and navigable rivers within the State, if their free navigation under the laws of the United States be not thereby impaired. The court therefore held in that case that the act of the State of Alabama entitled, "An act to provide for the improvement of the river, bay and harbor of Mobile," approved February 16, 1867, was not in conflict with the Constitution, *as it was not in antagonism with any act of Congress on the same subject.*

The next case cited by counsel in brief in court below is that of Gillman *vs.* Philadelphia (3 Wallace, 713): This case, like the others quoted, holds to the doctrine that, in the *absence of the exercise of jurisdiction upon the part of Congress*, a State may regulate commerce over navigable waters of a river wholly within the State; but to use the language of the court—

"Congress may interpose whenever it shall be deemed necessary, by either general or special laws. They may regulate all bridges over navigable waters, remove offending bridges and punish those who shall thereafter erect them. Within the scope of their authority both the legislative and judicial power of the nation are supreme."

In that case, which related to the construction of a bridge over the Schuylkill river, in the city of Philadelphia, there had been no exercise upon the part of Congress of its power to regulate commerce upon that river. We are wholly unable, however, to find anything in this case that can give any support whatever to the contention that section 12 of the act of September 19, 1890, is unconstitutional, while the whole theory of the case gives support to its constitutionality.

Again, counsel cite us the case of the Willamette Bridge Co. *vs.* Hatch, 125 U. S., 1.

The answer to that authority is simply this: Both the bridge authorized to be built by the State, and the decision of the court referred to, were all prior to the passage of the river and harbor act of 1890, in which Congress took jurisdiction. But, even now, we concede that in so far as the erection of a bridge across the Willamette river is concerned, the State has the right to *authorize* its construction, and also has the right *to construct it*, provided, that after authorizing its construction the plans are submitted to the Secretary of War and receive his approval before the work is commenced. This is the effect of the decision in 165 U. S., quoted by counsel, and so far from being an authority against us is really in our favor, as we have already shown that in the case of the erection of bridges Congress only exercised a *portion* of the power it might have exercised, while in the case of the establishment of harbor lines it exercised the *full power* Congress could exercise under the commercial clause of the Constitution of the United States.

Counsel then cite the case of the Gloucester Ferry Co., *vs.* Philadelphia, 114 U. S., 196. This case has been already cited in our brief in support of our contention. There is nothing in it from beginning to end which will

support the theory of counsel that the act of 1890 is unconstitutional.

Counsel next cite the ancient case of United States *vs.* Bailey, 1 McLean, 234, decided sixty-five years ago, in support of the unconstitutionality of the twelfth section of the act of 1890. The simple question determined in that case was this: That the crime of murder charged against a white man for killing another white man in the Cherokee country, but within the State of Tennessee, could not be punished in the courts of the United States. The court held that while Congress had power "to regulate commerce with the Indian tribes," this power did not authorize Congress to pass a law authorizing the Federal courts to entertain jurisdiction of the case of murder, committed by one white man killing another white man in the Cherokee country, that country at that time lying wholly within the State of Tennessee, and that therefore, the act of 1817 (3 Statutes, 383), which assumed to exercise a general jurisdiction over Indian countries *within a State* was unconstitutional and would have no effect.

McLean, circuit justice, in deciding the case, said:

"Congress have power to regulate commerce among the several States; and if the same power given in the same words in relation to Indians may be exercised as contended, why may not Congress legislate on crimes for the States generally. That Congress have no such general power is a proposition too clear for demonstration. The thing itself is so palpable that it is susceptible of no demonstration. The act in question provides for the punishment of a crime committed by one citizen upon another, wholly disconnected from any intercourse with the Indians."

The decision in that case, while undoubtedly good law, certainly has no application to the questions now before the court. Counsel cite the Mining Debris cases,

9 Sawyer, 441. But here again counsel are unfortunate, as the authority, if it can have any bearing whatever upon the case at bar, is directly against the contentions of counsel for appellants.

Judge Deady, in his concurring opinion with Judge Sawyer, page 547, says:

"By section 3 of the act admitting the State into the Union (19 Statutes 452), it is declared 'that all the navigable waters within the State shall be common highways.' If these words mean anything, the State is thereby restrained from obstructing or authorizing obstructions to the navigation of the Feather and Sacramento, which shall prevent their being used as common highways according to their capacity and condition when the State was admitted."

The opinions of both Judges Sawyer and Deady, from beginning to end, recognize the doctrine for which we are contending.

It must be borne in mind, furthermore, that section 9 of the act of August 11, 1888, which was under consideration and discussed by the courts in the cases of The United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178, *supra*, and in case of The United States *vs.* Rider, 50 Fed. Rep., 406, *supra*, was not even a part of the act of September 19, 1890, the twelfth section of which is now under consideration, and it must, furthermore, be perfectly apparent to both counsel and court that there is a very material difference between the character and purposes of the ninth section of the act of August 11, 1888, and the twelfth section of the act of September 19, 1890.

It is true the twelfth section of the act of September 19, 1890, now under consideration, was also the twelfth section of the act of August 11, 1888, and the same was carried forward into the act of 1890, as was also the ninth

section of the act of 1888, both sections being amended in the act of 1890. The ninth section was amended with the evident purpose of eliminating the objections urged in the courts to that section, while the amendment to the twelfth section was made with no such purpose, as that section had never been questioned, and was intended mainly to include, in the character of structures which should not be erected beyond the established harbor lines, except under such regulations as might be prescribed from time to time by the Secretary of War—not only "*piers*" and "*wharves*," as in the original section, but also "*bulkheads* and *other like works*," and also for the purpose of declaring any person who should violate the provisions of the twelfth section guilty of a misdemeanor, and subjecting him on conviction, to a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court.

For the information and convenience of the court we here quote the two sections, 9 and 12, of the act of August 11, 1888, and then quote the same as amended in the act of September 19, 1890. As amended the portions eliminated from the original sections are in parenthesis and *italics*, while the new matter inserted in the amendments are in ROMAN.

Section 9 of the act of August 11, 1888.

"SECTION 9. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge, now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States, is an obstruction to the free navigation of such waters, by reason of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the raft span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary to give notice to the

6127

persons or corporations owning or controlling such bridge to so alter the same as to render navigation through or under it free, easy and unobstructed; and in giving such notice he shall prescribe in each case a reasonable time in which such alteration is to be made. If, at the end of such time, the alteration has not been made, the Secretary of War shall forthwith apprise the Attorney General of the United States, whose duty it shall be to institute suit, in the name of the United States, without delay, in the circuit or district court of the United States for the circuit in which such bridge is located, which court is hereby invested with jurisdiction for this purpose to recover from the owners or managers of such bridge the fines mentioned in the succeeding sections of this act."

25 U. S. Statutes at Large, 424.

Section 9 of the act of August 11, 1888, as amended by section 4 of the act of September 19, 1890.

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge, now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States, is an UNREASONABLE obstruction to the free navigation of such waters (*by reason*) ON ACCOUNT of insufficient height, width of span or otherwise, or where there is difficulty in passing the DRAW-OPENING (*draw-span*) or the DRAW-SPAN (*raft-span*) of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, FIRST GIVING THE PARTIES REASONABLE OPPORTUNITY TO BE HEARD, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it REASONABLY free, easy, and unobstructed; and in giving such notice he SHALL SPECIFY THE CHANGES REQUIRED TO BE MADE, and shall prescribe in each case a reasonable time in which (*such alteration is to be made*) TO MAKE THEM. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith (*apprise*

the Attorney General of the United States, whose duty it shall be to institute suit, in the name of the United States, without delay, in the circuit or district court of the United States for the circuit in which such bridge is located, which court is hereby invested with jurisdiction for those purposes to recover from the owners or managers of such bridge the fines mentioned in the succeeding sections of this act) NOTIFY THE UNITED STATES DISTRICT ATTORNEY FOR THE DISTRICT IN WHICH SUCH BRIDGE IS SITUATED, TO THE END THAT THE CRIMINAL PROCEEDINGS MENTIONED IN THE SUCCEEDING SECTIONS MAY BE TAKEN."

Supplement to the Revised Statutes, vol. 1, 800.
26 Stat. U. S., 453.

Section 12 of the act of August 11, 1888.

"SECTION 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby authorized to cause such lines to be established, beyond which no piers or wharves shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him."

25 Stat. U. S., 425.

Section 12 of the act of August 11, 1888, as amended by section 12 of the act of September 19, 1890.

"SECTION 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized to cause such lines to be established, beyond which no piers [*or*] wharves, BULKHEADS OR OTHER WORKS shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him.

"AND ANY PERSON WHO SHALL WILFULLY VIOLATE THE PROVISIONS OF THIS SECTION, OR ANY RULE OR REGULATION MADE BY THE SECRETARY OF WAR IN PURSUANCE OF THIS SECTION, SHALL BE DEEMED GUILTY OF A MISDE-

MEANOR, AND, ON CONVICTION THEREOF, SHALL BE PUNISHED BY A FINE NOT EXCEEDING ONE THOUSAND DOLLARS, OR BY IMPRISONMENT NOT EXCEEDING ONE YEAR, AT THE DISCRETION OF THE COURT FOR EACH OFFENSE."

Supplement to Revised Statutes, vol. 1, 803.
26 Stat. U. S., 455.

The case of the United States *vs.* Romard *et. al.*, decided August 4, 1898, by the circuit court for the southern district of New York, 89 Fed. Rep, 156, is directly in point upon the question that section 12 of the act of 1890, *supra*, conferring certain powers on the Secretary of War, is not a delegation of legislative powers, and in support of the constitutionality of such sections.

In that case, Congress, by the act of June 29, 1888, as amended by the act of August 18, 1894 (28 Stat. at Large), sought to prevent the deposit of destructive and injurious deposits within the tide waters of the harbor of New York, section 1, prohibits "the deposit of refuse, dirt, ashes, cinders, mud, sand dredgings, sludge, acid or any other matter of any kind, other than that flowing from streets and sewers, and passing therefrom in a liquid state, in the tide-waters of the harbor of New York * * *." While section 3, requires persons proposing to "take or tow such forbidden matter to a place of deposit, to apply for and obtain from the supervisor of the harbor, appointed hereunder, a permit defining the precise limits within which the discharge of such scows or boats may be made," and any deviation from such dumping or discharging place specified in such permit is declared to be a misdemeanor within the meaning of the act. Romard and others were indicted under this act for dumping at a place other than one of those prescribed in the permit issued by the supervisor of the harbor, and it was contended that while Congress

had power to prescribe such limits, it could not authorize the supervisor of the harbor to fix the same, for the reason, as is claimed in the case at bar, that that would be a delegation of legislative power. The court, however, held differently and sustained the constitutionality of the act.

It was insisted also in that case as in this case that it fell within the principles enunciated in the case of United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178, *supra*, but the court, after citing the opinion in the above case said :

" In that case Congress had specifically authorized the bridge company to construct a bridge, and it did not appear that the construction was in violation of the terms of authorization, and the essential holding is that Congress can not delegate to a subordinate discretionary authority to nullify the act and the construction of the bridge pursuant to it. The opinion does not suggest that the United States in its constitutional control of navigable waters can not establish police regulations intended to prevent the deposit of material which would tend to create an obstruction to the waterway, and authorize a governmental officer to supervise the manner of discharging refuse and to designate the location of such deposit."

The court, discussing the case further upon the question as to the power of Congress to confer such powers upon the supervisor of the harbor, said :

" Congress did not thereby delegate to the supervisor any of its powers ' to regulate commerce ' and the included control of the navigable waters of the United States."

United States *vs.* Romard *et al.*, 89 Fed. Rep., 156.

This case is also directly in point upon the question as to the jurisdiction of Congress over the navigable waters of the United States.

This court in Deane *vs.* Willamette Bridge Co., 22 Oregon, 167, said:

"In passing upon the constitutionality of a law, an intent to violate the Constitution is not to be presumed in any case; and every doubt is to be solved, and every intendment given in favor of the constitutionality or the statutes."

Deane *vs.* Willamette Bridge Co., 22 Oregon, 167.

"The decision of a question involving the constitutionality of an act of the legislature," says Mr. Chief Justice Marshall, "is one of the gravest and most delicate of judicial functions; and while the court will meet the question with the utmost fairness when its decision is indispensable, it is the part of wisdom and a just respect for the legislature to waive it if the cause in which it arises can be decided on other points."

Ex parte Randolph, 2 Brock., 448.

Elliott *vs.* Oliver, 22 Oregon, 47.

"While the courts can not shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics; they will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra judicial disquisition is entitled."

Hoover *vs.* Wood, 9 Ind., 287.

Elliott *vs.* Oliver, 22 Oregon, 48.

Courts in passing upon the constitutionality of a statute must, if there is any reasonable doubt, sustain the statute, without regard to consequences.

People *vs.* Harper, 91 Ill., 357.

Nickerbocker *vs.* People, 102 Ill., 218.

Where the construction of a statute regulating a branch of the public service is doubtful, the court should adopt the construction acted on by the department.

Matthews *vs.* Shores, 24 Ill., 27.

Should the court, therefore, be of the opinion that there is any doubt about the constitutionality of the twelfth section, *supra*, it will adopt the construction of the Secretary of War affirming its constitutionality.

The power of the city or the port of Portland to establish harbor lines ceases when the the National Government acts. There must be no conflict. In this case there is a conflict.

XIX.

But the counsel for defendants in error, while virtually conceding the rightful establishment of the harbor lines on August 9, 1892, by the Secretary of War, insist that the act of the city in also establishing a harbor line is not in conflict with the act of the Secretary of War, for the reason it adopted the same line.

We might concede, and, in fact do, that there was nothing unlawful in the city adopting as the wharf line the harbor line established by the Secretary of War, but we confidently insist that, inasmuch as the only reason why such line was not absolutely inoperative, is because it did not conflict with the line established by the Secretary of War; therefore, whenever the harbor lines were changed by the Secretary of war, as they were, in the exercise of his unquestionable power, on September 23, 1898, then the wharf line established by the city, in so far as it conflicts with such line as relocated by the Secretary of War, must give way. It is impossible that *two* harbor or wharf lines, one established by the Na-

tional Government, and the other by the State government, can exist lawfully in the same harbor at the same time; much less is it possible, under any proper construction of the powers of the respective governments—National and State—that there can be, as insisted by defendants in error in this case, *three* different harbor lines existing at the same time in the same harbor, one established by the National Government, one by the city of Portland, and another by the port of Portland.

If it be true, as contended that the City of Portland, and the Port of Portland, each has jurisdiction and power to establish harbor lines, and if it be true as averred in the bill of complaint, that each has established such lines, the city Dec. 12, 1892, and the port of Portland Nov. 2 1898, then there is nothing to prevent them from establishing *different* and *conflicting* lines, and the fact that they both in this instance adopted the same line—and *that* the line first established by the Secretary of War, is no argument in favor of their jurisdiction or power. If each municipality has power to establish a line, as contended by counsel, then the power exists to establish on *different locations*, and also on lines neither of which may be on the line established by the Secretary of War, and hence we might have *three* different harbor lines, all conflicting.

Counsel for defendants in error insist that the only purpose or effect of the establishment of harbor lines by the Secretary of War is to fix a line beyond which if wharves or piers are built they will be deemed to be obstructions to navigation, and, therefore, a public nuisance, and that therefore, the State, or city acting under the State, or the port of Portland, acting under the State, either one or both, may fix a line *inside* of such harbor line so fixed by the Secretary of War, beyond which a wharf shall

not be built without being deemed in law an obstruction to navigation, and therefore a public nuisance. The contention, if the court please, cannot be maintained for one moment. The idea is based upon an absolutely false assumption as to the purposes of Congress in establishing a harbor line. What are these purposes? They are twofold in character. One purpose, it is true, is to fix a line beyond which wharves, piers, etc., shall not be built, but another equally important purpose is to establish a line sufficiently near the ship channel, or deep water, so as to enable those who are riparian owners or otherwise who have the right to build wharves, docks and warehouses, to connect these wharves, docks and warehouses, with ocean vessels. *This is a regulation of commerce*, and one with which *no State can interfere*. When this line is established, under authority of Congress, no State or city can establish another line which will prevent the building of wharves and warehouses up to the harbor line so established by direction of the General Government. Any other rule would place it within the power of a State to keep open a strip of land and water the entire length of the harbor, between the line established by Congress, and beyond which towards the land ships could not come, and the line thus established by the State or by the city, or the port of Portland, under authority from the State. The wharves, docks and warehouses in the city are as essential adjuncts in the carrying on of foreign commerce as are ships and pilots and sailors. Any legislation that denies the construction of any of these up to the harbor line established by Congress, is in direct conflict, therefore, with what has been done by Congress, and is therefore an attempted interference with the jurisdiction and power of Congress to regulate commerce among the States and with foreign nations, and is unconstitutional and void.

Such a power in the State might prove wholly destructive of the commerce of the city. It cannot be successfully denied that a declaration of the General Government that no wharf or pier shall be constructed beyond a certain established line is not in substance and legal effect a declaration upon the part of Congress that it shall be lawful to construct wharves, piers and warehouses for the benefit of commerce and in the aid of commerce up to such line. And if this is so, what jurisdiction or power has the State to declare that it shall not be lawful to construct these aids to foreign commerce up to such line. And when Congress has declared, as it has done in the act of 1890, that the Secretary of War may authorize and consent to the location of wharves and piers *beyond a certain established line*, what jurisdiction or power, we inquire of the court, has the State to say, either through the city of Portland or the port of Portland, as is claimed by the defendants in error here, that no wharf or pier shall be built within eight, ten, twenty or one hundred feet of such line, much less beyond it? The idea that there can be two harbor lines, or three harbor lines, as is possible under the theory of opposing counsel in this case, established in any city, one by the National Government, the other one or two by the State government, is simply preposterous.

Section 12 of the act of 1890 is a "*regulation of commerce.*" It provides that under certain conditions a certain harbor line shall be established. The Secretary of War is authorized to fix the location of such line. The act of Congress, however, not the Secretary of War, declares that *beyond* that line wharves shall not be constructed. This, it is submitted, is the equivalent of a legislative declaration that it shall be lawful in the interest of interstate and foreign commerce, to construct wharves up to such line, to the end that the ship and

the wharf—as absolutely required by the necessities of foreign and interstate commerce—may come together, in order that *foreign* and *interstate cargoes* may be loaded and unloaded from the one to the other.

Counsel in their brief, paragraph IV, page 3, say: "The mere establishment of a harbor line does not deprive the State of the right to regulate and control navigable waters *within* that line," and one authority only is cited in support of the proposition, that of People *vs.* Williams, 64 Cal., 499.

An examination of this case will show in a moment that it has absolutely no bearing whatever upon the case at bar. The court in that case, page 499, said:

"There is no doubt of the right of a State to control and regulate the use of navigable waters within its boundaries, *subject only to restrictions upon the right arising out of the power of Congress over commerce*, but it is claimed by the defendant that the State has by legislation surrendered its right over the *water highway* in question to the city and county of San Francisco."

Now, in that case there had been no restraint whatever placed upon the right of the State by Congress, and it was simply a question whether the right of the State to regulate the public use of the *navigable waters in question* had been taken away by the establishment of the harbor lines by the State. The court held that it had not, inasmuch as the sixth section of the act establishing the harbor lines provided as follows: "Nothing in this act shall be construed as a surrender by the State of its right to regulate the construction of wharves, or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor of San Francisco."

The sole point, therefore, decided in that case, was simply this: That the statute of the State of California,

passed March 26, 1851, granting to the city of San Francisco the tide-covered lands known as the beach and water lots, and which established a permanent water front for the city, did not deprive the State, *in the absence of Congressional action*, of the right of regulating the use of the *navigable waters* within the harbor lines thus established.

This authority, therefore, so far from sustaining the contention of the appellants, is an authority which directly supports the theory of the respondent.

Counsel for appellants, in the court below, in their brief, page 3 (Record 166), under subdivision VI, submit the following proposition:

"Said section 12 did not exclude the jurisdiction of the State *inside* the harbor lines fixed by the Secretary in 1898."

One authority only is quoted in support of this proposition. It is Veazie *vs.* Moor, 14 Howard, 574. We will examine this authority and ascertain precisely what bearing, if any it has, in support of the above proposition. The facts as stated in the opinion of the court are as follows:

"The river Penobscot is situated entirely within the State of Maine, having its rise far in the interior of the State. It is not subject to the tides above the city of Bangor, near its mouth, and between the city of Bangor and Old Town, a distance of eight miles, the Penobscot passes over a fall, is crossed by four dams erected for milling purposes, and for the above space is not at this time and never has been navigable.

"On the thirtieth day of July, 1846, the legislature of Maine, by a law enacted that William Moor and Daniel Moor, Jr., their associates and assigns, were authorized to improve the navigation of the Penobscot river above Old Town, and for that purpose were authorized to deepen the channel of the river, to cut down and re-

move any gravel or ledge, trees, rocks or other obstructions in the bed thereof; to erect in the bed, on the shore or bank of said river suitable dams and locks, with booms, piers, abutments, breakwaters and other erections to protect the same; to build upon the shore or bank of said river any canal or canals to connect the navigable parts of said river, or, in case it shall be deemed the preferable mode of improvement, by railroads for the like purpose.

"The fourth section of the act provided that if the said William Moor and Daniel Moor, Jr., their associates and assigns, should perform the conditions of the grant as contained in the preceding section, the sole right of navigating said river by boats propelled by steam from said Old Town so far up as they shall render the same navigable, is granted to them for the term of twenty years from and after the completion of the improvement."

The question involved was whether this act of the legislature of the State of Maine was a *regulation of commerce*, within the meaning of that provision of the Constitution of the United States. The court held, according to the syllabus of the case, as follows:

"A State law granting to an individual the exclusive right to navigate the upper waters of the Penobscot river, lying wholly within the limits of the State and separated from tidewater by falls, and impassable for the purposes of navigation, and not forming a part of any continuous tract of commerce between two or more States or with a foreign country, is not repugnant to the Constitution or any law of the United States."

By what process of reasoning the able and learned counsel for defendants in error can make any application whatever of this authority in support of the above proposition, is something, we confess, we are unable to understand.

Counsel at pages 20–21, of their brief, say:

"But it is argued that the city of Portland has no right to establish harbor lines where such lines have been established by the Secretary of War. Admitting for the sake of the argument that the State has no such right *eo nomine*, that is not the question in this case. *Harbor* lines and *wharf* lines are not necessarily identical."

This statement proceeds on the assumption that although the Secretary of War may have power to establish *harbor* lines in the exercise of the power conferred by the commercial clause of the Constitution, that notwithstanding this, while the city has no right *eo nomine* to establish *harbor* lines it has the power to establish *wharf* lines. If the city has this power to establish a *wharf* line, notwithstanding the action of the Secretary of War in establishing *harbor* lines, then the city may locate that line either *on* the *harbor* line, *inside* the *harbor* line or *outside* of the *harbor* line.

Conceding for the present that the city has this power to fix a *wharf* line, notwithstanding the action of the Secretary establishing a *harbor* line, counsel for defendants in error must agree with us that whatever action the city takes in establishing a *wharf* line must be *reasonable*. It must be a line that will not inevitably destroy absolutely the rights of the riprarian proprietor upon the one hand, or of those navigating ships in the harbor on the other. A *wharf* line, therefore, located eighty or one hundred feet towards the land, or inside of the *harbor* line established by the Secretary of War, would have the precise effect intimated above. It would create a lane eighty or one hundred feet between the ships and the wharf, and this fact is of itself conclusive, not only of the *unreasonableness* of such action, but also of the absolute lack of power in the city to establish any wharf line which in any man-

ner conflicts with a *harbor* line established by the Secretary of War. The action of the city, therefore, in establishing such a line everyone must see at a glance would be *unreasonable*. The ships can go no farther towards land than the *harbor* line fixed by the Secretary of War, while the shipper cannot come nearer the water with his produce than the *wharf* line fixed by the city. The result is the commerce of the city is destroyed by reason of the *unreasonable* and *destructive* action of the city in locating the *wharf* line at such a distance inside the harbor line. This all, of course, upon the theory that the action of the Secretary of War in establishing a harbor line is constitutional. And this, if the court please, is precisely what defendants in error insist on doing—that is to say, the right to establish a *wharf-line* eighty-five feet at one point, and running each way to a point *inside* or land side of the harbor line established by the Secretary of War, and *outside* or river side of which wharves cannot be built, thus in the case at bar, leaving a gap of eighty-five feet between wharf and ship.

Counsel Invoke the Police Powers of the State.

XX.

Under subdivision V in brief of respondent in the court below, page 2, counsel say: "To regulate the driving of piles, or the building of wharves within the harbor of Portland, is within the police powers of the city." And several authorities are cited. We will consider each of them.

The first is that of the City of Dubuque *vs.* Stone, 32 Iowa, 84. In that case there was no question whatever of conflict between the Federal and State authority, as the

General Government had never assumed jurisdiction and the court simply held that where a city is authorized by its charter to establish and regulate the use of wharves, fix the rates of wharfage, and regulate the anchorage and mooring of boats and rafts, it possesses, and may by ordinance exercise, the incidental power of prohibiting any and all persons, including those owning lots abutting on the stream navigated, from using any place other than the wharf so established by the city authorities, without permission of the city and payment of the ordinary wharfage fee.

It is conceded in this case that if Congress had never taken jurisdiction to establish harbor lines in the city of Portland, that then the city could regulate the matter by city ordinance under the provisions contained in its charter.

A reference to the syllabus of the case of Gray *vs.* Frazier, 21 How., 187, cited by counsel at page 2 of their brief, will show at a glance that the case has no possible bearing upon the questions involved. The syllabus is as follows:

"*In the absence of any act of Congress covering the same subject*, the ordinance of a city prescribing for her port at what wharf a vessel may lie, how long she may remain, where she may load or unload, where she may anchor and for what time, and what description of lights she shall display, are valid, *if they do not conflict with the general admiralty law.*"

Thus, it will be seen these local ordinances in order to be valid, must in the first place *not conflict with any act of Congress upon the same subject*, and secondly, they must *not conflict with the general admiralty law.*

The next authority cited is that of Vanderbilt *vs.* Adams, treasurer of the Hospital of the City of New York, 7 Cowen, 348.

In that case the court held that a statute of the State of New York, authorizing harbor masters to regulate and station vessels in the East and North rivers in the city of New York, and imposing a penalty for disobeying their orders or the orders of either, extends to wharves in the hands of private owners, and is not unconstitutional as interfering with private property, or impairing the obligation of contracts.

There was no question involved to the effect that the statute was in conflict with any act of Congress upon the subject of regulating commerce.

Again, the case of Hunt *vs.* Mayor (it should be Hart *vs.* Mayor), 9 Wendell, 570, is cited by counsel.

Here, again, the question involved is entirely different from any question in the case at bar. The controversy being as to the right of an individual, without a grant, to construct and moor a floating storehouse or vessel, for the receiving and delivering out of goods and merchandise, in any bay, river, or in any port or harbor, or any basin or docks thereof, and as to whether in such a case an injunction would lie at the instance of the corporation for the purpose of abating a public nuisance.

Counsel cite the celebrated license cases, 5 Howard, 574. It is difficult to perceive the precise application which counsel would make of these cases, or of the principles involved in them, or the decision of the court, to the case at bar. The questions decided in those were simply these:

In the two cases of Massachusetts and Rhode Island, the court, Chief Justice Taney, following the decision in the case of Brown *vs.* The State of Maryland, 12 Wheaton, 419, held that where the act of Congress authorized a certain liquor to be imported into this country, that no State had a right to levy a tax on such

liquor, or to require a license for the selling of such liquor, so long as the same remains *in bulk in the package unbroken* in which it was imported, or until such package *had been sold by the importer to a third party*, for the reason that the same up to such time was an article of *foreign commerce*, and therefore subject alone to the jurisdiction of Congress. But when the cask or package in which the imported article came into this country was *broken for sale in piecemeal*, or when the package was *transferred to a third party*, that then, in either of such cases, the article imported ceased to be an article of foreign commerce, the power of Congress over the same ceased, and the same was then subject to the State tax or license fee authorizing its sale.

While in the third case it was held that a law of New Hampshire, the effect of which was to prevent the sale, without a license, of a barrel of gin, purchased by the defendant in Massachusetts, and by him imported into New Hampshire, was not repugnant to the Constitution or laws of the United States, for the reason that although when the barrel of gin left the port in Massachusetts, having been purchased there by the defendant and forwarded by him to New Hampshire, it ceased to be an article of *foreign commerce* and became an article of *interstate commerce*, but as Congress had passed no law on the subject relating to *interstate commerce*, therefore the State of New Hampshire had the right to exact a license fee before the defendant could sell his gin. The opinion of the court in that case concludes as follows:

"Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one, for although the gin sold was an import from another State and Congress have clearly the power to regulate such imports under the grant of power to regulate commerce *among the several States*; yet *as Congress has made no regulation*

on the subject, the traffic in the article may be *lawfully regulated by the State* as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to impose."

This decision, therefore, is in direct line with our contention, that in many instances the State may enact laws regulating commerce, either foreign or interstate, where Congress has not legislated on the subject.

The case of the City of New York *vs.* Milne, 11 Peters, 132, 138, cited by counsel, presents an entirely different question from that now before the court. The question in that case was simply whether an act of the legislature of the State of New York, which inflicts a penalty upon the master of a vessel arriving from a foreign port who neglects to report to the mayor or recorder an account of his passengers, was or was not a regulation of commerce, but simply of police, and therefore not in conflict with the Constitution of the United States. A majority of the court held that it was not a regulation of commerce, and therefore the act was valid, although Mr. Justice Story delivered a very able and elaborate dissenting opinion, in which he held that it was a regulation of commerce. But even conceding that it was a regulation of commerce, it was not in conflict with any act of Congress on the subject, as held by a majority of the court, and for that reason was not unconstitutional.

Again, counsel quote in their brief, page 2, the case of Cooley *vs.* The Board of Wardens of the Port of Philadelphia, 12 Howard, 299 (erroneously cited in brief as 12 Wheaton), to support their proposition that the driving of piles, and the building of wharves within the harbor of Portland, is within the police powers of the city.

This is the leading case in which the question was determined for the first time by the Supreme Court of the United States, that the States respectively had the power to pass laws regulating pilots. But upon what was this decison based, and why is it that today the several States have power to pass laws regulating pilots on navigable waters? Simply this: Of course, prior to the adoption of the Federal Constitution, the power to regulate commerce among the States and with foreign nations rested with the States respectively. After the adoption of the Constitution, however, the Congress, on August 7, 1789, by section 4 (5th Statutes at Large, 153) provided as follows:

"That all pilots in the bays, inlets, rivers and harbors and ports of the United States, shall continue to be regulated in conformity with the *existing laws of the States* respectively wherein such waters may be, or with *such laws as the States may respectively hereafter enact for the purpose*, until further legislative provision shall be made by Congress."

It was, therefore, in pursuance of this congressional action that the Supreme Court of the United States held in the case *supra*—first holding, however, that the regulation of pilots on the navigable waters of the United States was a *regulation of commerce within the commercial clause of the Constitution of the United States*—that Congress by the act of 1789, *supra*, had recognized not only the then existing laws of the several States upon the subject of pilotage, but also the right upon the part of the several States to legislate upon that subject in the future. This is the whole of that case. What bearing, we would respectfully inquire of the court, can the decision in that case possibly have upon the one at bar? With all due respect to the able counsel of the other

side, it certainly can have none whatever. But, as has been said of several of the other authorities quoted by counsel, the decision taken as a whole is a direct recognition of the theory urged by us in this case.

In the case of Crandall *vs.* Nevada, 6 Wallace, 35, cited by counsel, the court held that a special tax on railroad and stage companies for every passenger carried out of the State by them, is a tax on the passengers for the privilege of passing through the State by the ordinary modes of travel, and is not a simple tax on the business of the companies, and that the existence of such a power to tax in the States is inconsistent with the objects for which the Federal Government was established, and with the rights conferred by the Constitution on that Government, and on the people, and that the exercise of such a power is accordingly void. The case, so far from supporting the theory of appellants, is just the reverse.

The case of Munn *vs.* Illinois, 94 U. S., 114, next cited in counsel's brief (Record, 46), is what is known as the elevator warehouse cases. And the syllabus of the case indicates clearly that the law of the State was held to be valid for the reason that there was no act of Congress upon the subject with which it came in conflict. The syllabus reads as follows:

"Where warehouses are situated and their business is carried on exclusively within a State, she may as a matter of domestic concern prescribe regulations for them, notwithstanding they are used as instruments by those engaged in interstate as well as in State commerce, *and until Congress acts in reference to their interstate relations*, such regulations can be enforced, even though they may *indirectly* operate upon commerce beyond her immediate jurisdiction."

The case of Thorpe *vs.* Rutland and Burlington R. R. Co., 27 Vermont, 149, is next cited.

The questions involved in that case were those relating solely to the power of the legislature of the State of Vermont to alter or repeal charters of private corporations, and to pass laws requiring such corporations to maintain cattle guards at all crossings, or to respond in damages for all cattle injured by their trains through such omission.

It is conceded by us that this power exists in every State, and is known and recognized as the police power of the State. That is the power upon the part of the State to legislate for the protection of the public health, the public morals and the *public safety.*

The next case cited by counsel in support of this proposition is that of Boston & M. R. Co. *vs.* The County of York, 79 Maine, 386. (Record, 46.)

The question decided in that case was simply this: That railroad companies may constitutionally be required by the county commissioners of the county of York to build and maintain highway crossings, under the Revised Statutes of the State of Maine, although such liability is imposed by a statute enacted subsequent to the chartering of such companies, and although their charters provide that they are not subject to "*amendment, alteration or repeal.*" This the court held could be done under the police power of the State, and for the purpose of protecting the *lives, limbs and property of the county.*

No question of conflict between the Federal and State law figured in that case, nor was there any principle involved that could be with propriety made applicable to any feature of the case now before the court.

Respondent Montgomery has the right to construct his wharf as far beyond the line of low-water mark as he is constructing it by virtue of the grant in the act of 1862. Hill's Code, section 2447.

XXI.

We concede, as has already been said, that in the absence of any act of Congress taking jurisdiction of the question of establishing harbor lines in this city, the State could establish such lines, and the State of Oregon did, by the act of October 17, 1862, second volume, Hill's Annotated Laws of Oregon, sections 4227, 4228, take jurisdiction in the matter.

By the first of these sections, it will be seen the owner of any land in the State of Oregon, lying upon any navigable stream within the corporate limits of any town, is authorized to construct a wharf or wharves upon the same, *and extend such wharf or wharves into such stream beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ship or other boats or vessels that may or can navigate such stream.*

Here is a *positive grant* upon the part of the State of a right upon the part of the riparian owner *to extend his wharf beyond low-water mark so as to connect with vessels of all sizes navigating such river.* There is nothing in the act of Congress authorizing the Secretary of War to establish harbor lines, that in any manner conflicts with this section of the statute. Therefore, it stands to-day in full force, in harmony with the act of Congress of September 19, 1890.

The next section, however, of this State law (4228) confers power upon the city to prescribe the mode of exercising this privilege and the *line of low-water mark.*

This section, therefore, is in direct conflict with the seventh and twelfth sections of the act of Congress of September 19, 1890, and must, therefore, give way to the congressional enactment.

But suppose it should be held there is no conflict. Then it is confidently submitted the city has not by this section any right or power to *fix an arbitrary line beyond which such wharf shall not be built.* The only line the city is authorized to establish is the one fixed by section 4227, *supra*, and is a line *beyond low water-mark* so far as may be necessary and convenient for the "*use and accommodation of ships navigating the harbor.*" The question as to what is "*necessary and convenient*" for the *use and accommodation of ships*, is a question of *fact* which the mere declaration of a municipality cannot determine. All the city can do, provided it has any power left under section 4228, *supra*, is to fix a "*line of low water-mark.*"

Hill's Code, sec. 4227.
Hill's Code, sec. 4228.
Yates *vs.* Milwaukee, 10 Wall., 504.

The act of 1862, section 4227, Hill's Annotated Laws of Oregon, grants to the respondent Montgomery as the owner of land lying on the Willamette river, the right to construct his wharf upon said lots lying within the city of Portland, and the further right "*to extend the same into such stream beyond low water-mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream.*

The evidence in this case (see different measurements of depths of water marked on map "Exhibit A," part of answer) shows that the depth of water on the harbor line as re-established September 23, 1898, averages at low water *less than eight feet.*

It appears, therefore, *affirmatively* by, and is absolutely clear from the record in this case, that the respondent has in virtue of the section of the act of 1862, *supra*, the right to extend his wharf at least to this line, that is, the harbor line re-established by the Secretary of War September 23, 1898; and even if under the circumstances of this case the following section of said act, 4228, giving the city the right to "regulate the exercise of the franchise granted" by section 4227, can be construed as still having life, which we deny, there is no suggestion or averment in the bill of complaint that the respondent is either extending his wharf beyond the line authorized by section 4227, or that he is constructing the same in the absence of any regulation by the city.

Inasmuch, therefore, as the respondent has the right by *direct and positive grant from the State* (act of 1862, section 4227, Hill's Code) to extend his wharf beyond low-water mark *so far as may be necessary and convenient for the use and accommodation of any ship or vessel that may or can navigate said river*, the city has no power, whatever, either by virtue of section 4228, Hill's Code, or of the provisions of the present city charter, to fix a line at any place beyond which such wharf shall not be extended, *short of a line "necessary and convenient for the use and accommodation of the largest ships that may or can navigate such river,"* and the record in this case clearly shows *affirmatively* that in order to accommodate such ships, such wharf must be extended at least as far beyond low-water mark as the location of the harbor line established by the Secretary of War in September, 1898. (Record, 126–127.)

It is submitted there is no power conferred upon the city by section 4228, Hill's Code, to establish any line outside of which respondent's wharf should not be constructed. The only line the city is authorized to pre-

scribe by that section, conceding for the argument the section to be still operative, is the "*line of low-water mark;*" but by the *express terms* of section 4227 the respondent has the right to extend his wharf, "*beyond* low-water mark," and not only beyond low-water mark, but beyond it "*so far as may be necessary and convenient for the use and accommodation of any ship or other boats or vessels that may or can navigate such stream or other like water.*" (Record, 68; also 125–127.)

Common-law Rights of Riparian Owners.

XXII.

The riparian owner, in the absence of restrictive legislation, has the right in his own interest, as well as in the interest of the public, to connect his shore line by means of wharves, piers or docks, constructed in the shoal or shallow waters immediately bordering upon his land, *with the waters which are navigable in fact.*

Railroad Company *vs.* Schurmeier, 7 Wall., 272.
Yates *vs.* Milwaukee, 10 Wall., 297.
Weaver *vs.* Harbor Commissioners, 18 Wall., 57.
Dutton *vs.* Strong, 1 Black., 23.
Lewis *vs.* City of Portland, 25th Oregon, 133.

In Yates *vs.* Milwaukee, 10 Wall., 498, *supra*, Mr. Justice Miller, in delivering the opinion of the court, said:

"It does not seem to be necessary to decide whether the title of the lot extends to the thread or channel of the river, though if the soil was originally part of the public lands of the United States, as seems probable, the case of The Railroad Company *vs.* Schurmeier, 7 Wall., 272, would limit the title to the margin of the stream. But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; *and among these rights are access to*

the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public whatever those may be. This proposition has been decided by this court in the case of Dutton *vs.* Strong, 1 Black, 25, and The Railroad Company *vs.* Schurmeier, just cited. The supreme court of Wisconsin has gone further and asserts that the doctrine that the *title* of the owner of such lot extends to the center of the stream, subject to the easement of the public in its use for navigation, and that he 'may construct docks or landing places for goods or passengers, taking care that vessels employed in navigating the stream are not impeded in their passage, nor prevented from the use of all parts of the stream which are navigable.' Walker *vs.* Shepardson, 4 Wisconsin, 486.

"The riparian right *is property*, and *is valuable*, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

14 amendment Const. U. S.

Yates *vs.* Milwaukee, 10 Wall., 498.

Lewis *vs.* City of Portland, 25th Oregon, 133.

City of Janesville *vs.* Carpenter, 77 Wis., 288.

Rumsey *vs.* N. Y. & New. Eng. R'y Co., 133 New York, 79.

In the Railroad Co. *vs.* Schurmeier, 7 Wall., *supra*, the court held:

"Viewed in the light of these considerations, the court does not hesitate to decide that Congress, in making the distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering

on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways. Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves for the convenience of commerce and navigation as accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide."

This authority, Yates *vs.* Milwaukee, *supra*, is directly in point on the following propositions involved in the case at bar:

The owner of land bounded by a navigable river has certain riparian rights, whether his title extends to the middle of the stream or not.

Among these are *free access to the navigable part of the stream*, and the right *to make a landing, wharf, or pier for his own use or for the use of the public.*

These rights are valuable and are *property*, and can be taken for the public use only when *due compensation is made.*

They are to be enjoyed, subject to such general rules and laws as the legislature may prescribe for the protection of the public right *in the river* as a navigable stream.

The decisions of the supreme court of Oregon fully sustain our contention.

But the principles for which we are contending as to the right of plaintiff in error as a riparian owner to construct and extend his wharf *as far beyond low-water mark as may be necessary and convenient for the use and accommodation of ships* has been fully recognized and definitely settled by this court in several cases, notably in Parker *vs.* Taylor, 7 Oregon, 446; Parker *vs.* Rogers, 8 Oregon, 190; Andrews *vs.* Knott, 10 Oregon, 501; Bowlby *vs.* Shively, 22 Oregon, 410, and Lewis *vs.* City of Portland, 25 Oregon, 133.

In these cases every phase of the law relating to the ownership in tide lands, shore lands and lands under tide waters; also of lands under navigable and non-navigable waters, in which the tide does not ebb and flow; and the riparian rights respectively of those owning lands on these several kinds of waters, has been exhaustively and ably discussed by the supreme court of the State of Oregon. And what have been the conclusions, as finally summarized in the latest case—that of Lewis *vs.* City of Portland, 25 Oregon, *supra*—in so far as they bear upon, and have application to, the case now before the court?

They are as follows: *First*—That court gave recognition to the custom which has prevailed from the early settlement of the country in respect to the building of wharves by riparian owners, out to the navigable waters; this, upon the principle *consuetudo pro lege servatur*, and also held, that the legislation of the State upon the subject, justified the conclusion that the State had, in such legislation, also recognized such custom, and affirmatively approved it; and hence it was held in the case of Lewis *vs.* City of Portland, *supra*, (1) That riparian proprietors, on the navigable rivers of this State, who have built wharves out to navigable waters in front of their upland, have rights of property therein which can not be taken for public use, except after due compensation first paid. (2) The object of sections 4227, Hill's Code, which authorizes the owners of land on navigable streams, and within the limits of incorporated cities, to construct wharves thereon, and extend them out to navigable waters so far as convenient and necessary for the use and accommodation of ships, being to encourage the building of wharves in aid of navigation and commerce, therefore, riparian owners on navigable streams within the limits of an incorporated city, who,

before the passage of such section, had built wharves on such upland, and extended them out to navigable water, acquired within the spirit and intent of said section, *property in such wharves*, which can not be taken for public use without just compensation; and *further*, that the riparian owner in such case acquired a *vested right* in such *wharf property* that can not be taken for public use without just compensation.

While it is true the wharf in controversy in the case of Lewis *vs.* City of Portland, *supra*, had been constructed *prior* to the enactment of section 4227, *supra*, yet it is very manifest that no *vested right*, or *property right*, could be acquired, which could not be taken for public use without compensation, unless there was an *inceptive primary right*, as against the State, to construct and extend the wharf to navigable water. No vested right in property can be acquired by a trespasser. No property rights that can not be taken for public use without compensation can be acquired by one who without right or authority enters upon the public domain. The ownership of land below high-water mark on the Willamette river was originally, under the decisions of this court, vested in the State. If then the State has not, either by positive legislation, or otherwise, as by no *negative* legislation and by *acquiescence*, relinquished to riparian proprietors the right to extend their wharves, then such proprietors cannot, by mere appropriation, acquire any vested right therein.

But not only so, all the reasoning, and the entire opinion of Chief Justice Lord in that case, are to the effect, that in the *then* state of legislation on the subject, the owner of lands lying on the Willamette river, within the limits of an incorporated city had a right to extend their wharves beyond low water mark, so far as necessary and convenient for the use and accommodation of

ships or other vessels navigating such. We respectfully submit, therefore, the decision in Lewis *vs.* City of Portland is an authority directly in point as to the right of plaintiff in error, in so far as the State can confer such right to extend his wharf so far beyond low-water mark as may be necessary and convenient for the use and accommodation of ships navigating said harbor, and the State is estopped from making denial of such right. In the case of Lewis *vs.* City of Portland, *supra*, the same counsel represented Lewis, the wharf owner, that now represents the defendants in error herein. If not treading on unprofessional ground, and we only desire to be complimentary, we would respectfully attract the attention of the court to their very able and instructive brief in that case, in favor of the rights of riparian proprietors, on pages 147–149—25 Oregon.

It is clear that in virtue of section 4227, Hill's Code, either *granting irrevocably, or licensing* the riparian proprietor, to extend his wharf beyond the line of low-water mark, so far as necessary and convenient for the use and accommodation of vessels navigating the Portland harbor, and of the proviso in the act of 1876 (Session Laws, 1876, p. 70), which provides: "That the Willamette, Coquille, and Coos rivers shall not be deemed rivers in which the tide ebbs and flows within the meaning of this act. * * * And that the title of this State to any tide, and overflowed lands upon said rivers *is hereby granted* and *confirmed* to such *owner of the adjacent lands*," and in view of the further fact that there is no *restrictive* legislation, it is perfectly clear that the right of plaintiff in error to extend his wharf to *deep water*, can not be questioned by the State, or by any municipality representing the State.

We have insisted elsewhere in this argument that said section 4227, Hill's Code, act of 1862, was a *grant*, and

something more than *a mere license*. Such also it seems was the opinion of counsel for defendants in error when representing Lewis, the wharf owner, in the case 25 Oregon, *supra*. We quote the following from their brief in the case, page 148:

"It was suggested that the act of 1862 (section 4227, Hill's Code) was only a license, and revocable. We think *it grants something more than an ordinary license;* but if it be simply a license, then it has been executed, and a court of equity will not allow a licensor to revoke an executed license without compensation to the licensee. (Washburn on Easements, 3d ed., page 680.)"

So say we; but conceding for the argument that section 4227, Hill's Code, is not, as we claim, and as counsel for defendants in error claimed in the Lewis case, *a grant*, but simply *a license* revokable at the pleasure of the legislature, until acted upon or availed of, it has not as a matter of fact ever been revoked by the legislature, but still is in full force and effect. And the record in this case (bill of complaint, Abstract of Record, 1–9) (Record, 16–20) shows that the rights conferred by this section had, at the commencement of this suit, been accepted, and was being *exercised by the plaintiff in error* by the construction of his wharf, and hence, having been thus acted upon and availed of, the power of the legislature to revoke it is forever gone.

Bowlby *vs.* Shively, 22 Oregon, 420.
Washburn on Easements (3d ed.), p. 680.
Brief of George H. Williams, C. E. S. Wood, S. B. Linthicum and J. Couch Flanders, counsel for Lewis, 25 Oregon, 144–149.

In considering, furthermore, the nature and extent of the rights of riparian proprietors on *the* navigable waters of the Willamette river, the act of the Oregon legislature,

approved October 26, 1870, as amended by act approved October 21, 1876 (Sess. Laws, 1876, p. 70) must not be overlooked. By that act the State *granted* and *confirmed* to all the owners of lands adjacent to the waters of the Willamette, Coos and Umpqua rivers, all the title which the State then had to all *tide* and *overflowed* lands upon said rivers. The act says that these three rivers "shall not be deemed rivers in which the tide ebbs and flows within the meaning of this act," and the State supreme court, in Andrus *vs.* Knott, 12 Oregon, 501, held there were no *tide lands* within the meaning of this act on the Willamette river at the city of Portland. It will be observed, however, the act grants to riparian proprietors not only all *tide* lands but all *overflowed* lands. This court, in Andrus *vs.* Knott, did not pass upon the question as to what constitute *overflowed* lands within the meaning of the act of 1876, or whether there are or are not *any such lands* within the limits of the city of Portland "*adjacent*"—that is the term used in the statutory grant—to the Willamette river. The claim of plaintiff in case Andrus *vs.* Knott, was that the lands in controversy were *tide* lands, not *overflowed* lands. The question, therefore, as to what constitutes "*overflowed*" lands within the meaning of said act is, it is submitted, an open one. That the use of these two designations, "*tide*" and "*overflowed*," by the legislature was not intended as descriptive of but *one* class of lands, that is lands "tide *and* overflowed," but was intended to designate *two* kinds of lands wholly different from each other; the one covered by the *tides*, the other by *overflow*, is perfectly plain. What constitutes *tide lands* is correctly described by this court in Andrus *vs.* Knott, 12 Oregon, 521, as lands "*covered and uncovered by the ordinary tides.*" In other words, "lands which are adjacent to navigable waters, and where the

tide flows and reflows, and which at *high tides are submerged and at low tides are bare.*"

What, then, are the *overflowed* lands granted by the act? We submit they are those lands adjacent to the river which lie between ordinary high and ordinary low-water mark. It is manifest this was the character and description of land intended to be covered by the term "*overflowed lands.*" The act had no reference to lands away from the river. They must be overflowed lands, and lands *adjacent* to the navigable waters of the river, and, as it must be presumed the State intended to grant something, and as that is the only *something* that can be covered by the act, it seems to us that those were the lands to which the grant attaches. We quite agree, therefore, with counsel for defendants in error in the statement contained in their brief in the case of Lewis *vs.* City of Portland, 25 Oregon, 146, in which they say:

"If the land upon which the plaintiff's wharf stands between high and low-water mark is tide land, then it is expressly *granted* and *confirmed* to the plaintiffs (respondent) by section 1 of the act of October 21, 1876, Laws of 1876, page 70, and becomes *absolutely their property.*" And we may say still further that if the land upon which the plaintiff in error is building his wharf is *overflowed* land within the meaning of that act, then also the same is *expressly granted* to him by said act. And this view is also supported by the following statement in counsel's brief, case Lewis *vs.* City of Portland. They say:

"Assuming, then, that under the acts of our legislature and the decisions of the Supreme Court, the Willamette river at Portland is a river in which the tide does *not* ebb and flow within the ordinary meaning of those terms, we refer to the following cases holding that the riparian proprietor has a right to build a wharf extend-

ing into the river for his own use, and for the use of the public, and as far as the necessities of navigation may require: Yates *vs.* Milwaukee, 77 U. S., 10 Wall., 497; The Illinois Central Railroad Co. *vs.* Illinois, 146 U. S., 387. (This, by the way, is the same case now quoted by counsel against us.) Parker *vs.* West Coast Packing Co., 17 Or., 515; Gould on Waters, sec. 179."

Counsel's Brief, case Lewis *vs.* City of Portland, 25–'6 Oregon.

Quarantine Laws.

XXIII.

Counsel in their brief seek to draw an argument from the quarantine laws.

Quarantine laws are necessarily laws for the protection of the public health. Their enactment, therefore, is clearly an exercise of the police power, but it is a police power attaching to the Federal Government as well as the State government. Each may enact quarantine laws, and each, so long as they do not conflict, may be enforced. But if a conflict arises, then the law enacted by the State, *although an exercise of the police power*, must give way to the law enacted by the National Government.

The Supreme Court of the United States in Mo[redacted]n *vs.* Louisiana, 118 U. S., 464, speaking by Mr. Justice Miller, said:

"But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, *the State laws on the subject will be abrogated, at least so far as the two are inconsistent*, but until this is done the laws of the States on the subject are valid. * * * Quarantine laws belong to that class of State legislation which, whether passed with intent to regulate

commerce or not, must be admitted to have that effect, and which are valid *until displaced or contravened by some legislation of Congress.*"

Morgan *vs.* Louisiana, 118 U. S., 465.

Counsel say:

"The jurisdiction of the State and General Government *are* concurrent. There is nothing extraordinary about this. They are concurrent as to pilotage, inspection, quarantine, and other similar laws for the protection of ships, skippers and sailors."

Counsel, however, neglected in this statement of the law as applicable to this suit, to state a vital and most important proviso, or qualification, to the effect, especially in the case of quarantine laws, that the laws, rules and regulations of the National and State governments, respectively, are only concurrent, and can only be enforced respectively, *when they do not conflict*. When they do conflict then those of the State fall into "*innocuous desuetude*" and are abrogated. As to laws regulating pilots, we have already shown that Congress at its first session in 1789 relinquished its right to the several States.

The Supreme Court of the United States, speaking further of quarantine laws, in Morgan *vs.* Louisiana, 118 U. S., 464, says:

"While it may be a police power in the sense that all provisions for the health, comfort and security of citizens are police regulations, and an exercise of the police power, it has been said more than once in this court, that even where such powers are so exercised as to come within the domain of Federal authority, as defined by the Constitution, *the latter must prevail.*"

Gibbons *vs.* Ogden, 9 Wheat., 1–210.

Henderson *vs.* The Mayor, 92 U. S., 259–272.

New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650–661.

We readily concede, were it not for the conflict with the action of the Federal Government, that in case it were necessary *as a matter of fact*, in order to preserve and protect the Portland harbor in the interest of commerce and navigation, that the port of Portland could widen the harbor by cutting a channel twenty-five feet deep, for such width as might be *reasonably necessary*, even if such cut extended to the center of respondent's lots, taking 10, 20, 50, or even 100 feet of the dry land, but in such a case to do so the board of commissioners of the port of Portland must proceed in the proper way, that is, by bringing into exercise the power of *eminent domain*, condemning the property thus needed for this public use, and by *making compensation* therefor. In such proceeding the right of trial by jury would be preserved to the respondent, and such jury under direction of the court would be called upon to decide *two* questions: *First*, is the use for which the property is required a *public* one, and *second*, what is the amount of compensation the port of Portland must pay for the property needed for such purposes?

As the matter stands now, the plaintiff in error has by direct grant from the State, as we have already shown (Hill's Code, sec. 4227), the right to extend his wharf beyond the line of low-water mark so far as *necessary and convenient* for the use and accommodation of the largest ships coming to the harbor. This is a *property right*. It is a right Montgomery cannot be deprived of *without just compensation*. He cannot be deprived of it *without due process of law*. Therefore, a court of equity has no jurisdiction or power to deprive him of it, or to restrain him from exercising it until the board of commissioners of the port of Portland at some indefinite time in the future —"*in the near future*," the resolutions of the board say (Abstract of Record, 6)—get ready to widen the channel.

14 amended Const. U. S.
Yates *vs.* Milwaukee, 10 Wall., 498.
And authorities, *supra*.
Art. I, sec. 18, Const. of Oregon.

The learned counsel, it must be presumed for want of something better in the way of argument, enter the realm of philology. On pages 26 and 27 of their brief they say:

"Harbor lines and wharf lines are, or may be, entirely distinct. Etymologically a harbor is a place for ships where they may ride at anchor. A wharf is a landing place for cargoes." (Record, 59.)

Most assuredly a wharf "*is a landing place for cargoes.*"

What is a cargo? The lexicographer says it is the "lading or freight of a ship; the goods, merchandise, or whatever is conveyed in a ship; load, freight."

And consulting Webster further, we find a "*wharf*" defined as follows:

"A perpendicular bank of ground, or timber, or stone and earth, raised on the shore of a harbor, river, canal or the like, and extending some distance into the water, *for the convenience of loading and unloading ships and other vessels.*"

While Bancroft, says: "Commerce pushes its *wharves into the sea.*" And if we may be permitted for a moment to drop into poetry, we might quote from Tennyson:

"Out upon the *wharves* they came,
Knight and burgher, lord and dame."

Taking, then, these different definitions of *harbor* and *wharf*, respectively, does it not follow that the wharf and the navigable waters of the harbor must be brought together? The ship must be able to go to the wharf, otherwise the *cargo*, the goods, wares and merchandise on the ship could not be unloaded on the wharf. But our learned friends contend that, although Congress may, through the Secretary of War, establish a *harbor* line,

beyond which, shoreward, ships may not go, yet the State or city may establish a *wharf* line at any place *inside* such harbor line ten, twenty, yes, eighty-five feet distant, as is claimed in this case, from such harbor line, and beyond which towards the harbor wharves shall not be extended, thus, as we repeat, leaving a gap, or lane, eighty-five feet in width between the ship and the wharf. Such is the glaring absurdity to which the theory of counsel inevitably leads. Such is the argument advanced to sustain the jurisdiction and action of the State against those of the Federal Government.

We cite this as a fair sample of the arguments which the able and learned counsel for defendants in error are compelled to resort to by the necessities of this case. *Ex uno disce omnes; ex pede Herculem.* In this instance, however, the foot disclosed is that of a dwarf rather than that of a Hercules.

Counsel for defendants in error in their brief, page 28, say:

"This court may take judicial notice, because it is a part of the public history of the State that this port of Portland has expended more than $600,000 in the improvement of the Willamette and Columbia rivers." (Record, 60.)

We might reply to this by saying, that this court may take judicial notice, because it is a part of the public history of the State, and also of the operations of the board of commissioners of the port of Portland, *and a fact as well*, that whatever may have been spent elsewhere in the Willamette and Columbia rivers, not a cent, aside from about $2,000 paid a dredger, have they in all the eight years of its existence, expended within the limits of the city of Portland in either harbor or river in either deepening, widening, or otherwise improving the channel or harbor.

Conceding the right of the port of Portland to make any decision affecting the plaintiff in error, such decision is neither conclusive nor binding.

XXIV.

Counsel insist that "the decision of the port of Portland is binding upon respondent." And in support of this somewhat startling proposition we are cited to the following authorities, and these only:

Am. & E. Ency. of Law, page 1046 and cases cited.

Dillon on Municipal Corporations, secs. 832, 836. (Record, 46.)

In this connection let us examine and ascertain what it is *precisely* that the board of commissioners of the port of Portland have *decided*, and which *decisions*, according to counsel's contention, are *conclusive* against Montgomery and everybody else. They decided November 2, 1898:

1. That the wharf line established prior to July, 1898 by the United States engineers, curtails the navigable waters of the Willamette river at the city of Portland to the full extent, which may be done in the interest of the shipping interests of the port.

2. That in order to provide sufficient space and width of channel to accommodate the shipping interests of the port, it will be necessary *in the near future*, to so improve the channel of said river from the steel bridge to the south end of Swan Island, by making it twenty-five feet deep its full width, between the wharf lines established by the United States engineers prior to July, 1898.

3. That to allow any wharves to be extended into said Willamette river within the limits of the city of Port-

land, beyond the wharf lines so established, *supra*, will be to create a lasting damage to this port and the shipping interests thereof. (Record, 40.)

Now, how do these three *decisions*, taken together, affect the property and interests of Montgomery? The "*wharf-line*," as counsel, and also the board of commissioners of the port of Portland in their resolutions call it, established by the "*United States engineers*," as also stated by them, was located along and in front of the respondent's property where the water was and still is at no point two feet in depth, and the average depth of which was and is not one foot. The depth by actual measurement (see map attached to answer, marked "Exhibit A," Abstract, 35), on the line established by the Secretary of War September 23, 1898, at the remotest distance—about eighty-five feet—from the line established by him August 9, 1892, and at greatest depth, is not quite thirteen feet deep, and the average depth of water along said line established in 1898, in front of the respondent's property, is not quite eight feet (see map attached to answer, "Exhibit A." (Abstract, 35 and 39.)

Now, it is an historical fact known to all, this court included, that many ships come to Portland every month in the year drawing, when loaded, from twenty-two to twenty-three feet. And further, that the busiest shipping months in Portland are those when the water is lowest of the year. It is a further fact shown by the record in this case (seventh finding of fact, Abstract, 40) (Record, 9), that the distance opposite respondent's property, between the line established by the Secretary of War September 23, 1898, and that established by him on the other side of the river, August 9, 1892, is about one thousand feet, while the distance across the harbor nearly one mile above is only six hundred feet, and is spanned by a railroad bridge resting on piers. (Record, 9.)

In view, therefore, of these conceded facts, can it be said that the *decisions*, so called, of the board of commissioners of the port of Portland are *reasonable*, much less *true as a matter of fact?* and if *unreasonable* or *untrue as a matter of fact*, then we submit they are not binding on either Mr. Montgomery or any one else.

Counsel say (Brief, 30) it is a reasonable decision because it conforms to the decision of the board of engineers in 1892, and also to the decision of Major Fisk, the United States engineer. There might be some force in this argument were it not for the stubborn fact that both of these decisions have been overruled and set aside because they were *unreasonable*, by both the Chief of Engineers of the United States Army and the acting Secretary of War.

If the port of Portland has, in the interest of the harbor, the right to dig a channel twenty-five feet deep out to a line in front of plaintiff in error's property where the water is less than one foot deep, then for the same reason, they can go five, ten, fifteen or one hundred feet further landward on respondent's property. And in such case will it be contended that Mr. Montgomery could be thus deprived of his property by the mere *ipse dixit* of the board of commissioners of the port of Portland? Such a proceeding would be in plain violation of the fourteenth amendment to the Constitution of the United States which, among other things, provides:

"Nor shall any State deprive any person of life, liberty or property without due process of law."

It would be also in direct conflict with section 18, article I, of the constitution of the State of Oregon which, among other things, provides that "private property shall not be taken for public use * * * without just compensation."

Neither the Decisions of the City of Portland, nor the Port of Portland, are Conclusive.

XXV.

Counsel for defendants in error, in their brief in court below, page 30, say:

"The port of Portland has decided that the construction of the wharf, as proposed by Mr. Montgomery, will shoal the navigable waters of the river and obstruct its work in making and widening a channel as required by its act of incorporation, and this *decision is conclusive upon him and upon all the citizens of Oregon.* It is a reasonable decision, because it conforms to the decision of the board of engineers in 1892, and also to the decision of Major Fisk, U. S. engineer in charge of said river, *and there is no appeal from it.* It has the same force and is as binding as an act of the legislature to the same effect." (Record, 61.)

This, it is respectfully submitted, is a most monstrous proposition. Neither the city of Portland, nor the State of Oregon, by a direct statute, could declare that the construction of the wharf, as proposed by Mr. Montgomery, will shoal the navigable waters of the river and obstruct the work of the port of Portland in making and widening a channel as required by its act of incorporation, which would be binding upon Mr. Montgomery and on the courts, or from which there could be no appeal.

"A law is a rule of action prescribed by the supreme power of a State, commanding what is right and prohibiting what is wrong."—Blackstone.

Such a declaration as the above in an ordinance or in a statute is not a *rule of action*, it is not a *law;* it is a *decision* by the legislature, a decision by the municipality, the effect of which is to deprive a man of his property *without due process of law.* Such a

statute or such an ordinance is, as to the *facts* it undertakes to *decide*, open to review by the courts. The State or city might have enacted such a law undertaking to decide *certain facts* as to the effect of the construction of the wharf, and then might have attached a penalty to be imposed by the court on conviction, in case he proceeded to construct the wharf contrary to the decision of the ordinance, and in case of violation by Mr. Montgomery he could have been arrested for a violation of the law. Would it be contended by the learned counsel for appellants that in such case the *facts* decided by the ordinance were not open to review on evidence? Certainly not.

This decision by the port of Portland, while we contend that they had no jurisdiction or power whatever to make any declaration upon the subject or to establish any wharf line, is, in so far as it undertakes to decide facts, a mere *brutem fulmen*.

A statute of a State which confers on a city the power to establish dock and wharf lines and to restrain encroachments and prevent obstructions to such stream, does not authorize it to declare by special ordinance a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, when *in point of fact* it is *not an obstruction or hindrance to navigation.*

Yates *vs.* Milwaukee, 10 Wall., 498.

As bearing upon this point, the Supreme Court of the United States, speaking by Mr. Justice Miller, in Yates *vs.* Milwaukee, 10 Wall., 504, says:

"The act of the Wisconsin legislature, approved March 31, 1854, confers upon the city of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee rivers, and restrain and prevent encroachments upon such rivers and obstructions thereto. And it is by this statute that the summary proceed-

ings for the removal of the appellant's wharf are supposed to be authorized. *But the mere declaration of the city council of Milwaukee that a certain structure was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character.*"

And the Court proceeding further says:

"It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposedt o be aggrieved, or even by the city itself. * * * It is true that it is said in the argument that the city council has established a wharf and dock line under the authority of the statute we have cited, and that Yates' dock projects beyond that line. No such defense is set up in the answer, and the existence of such a line, being a matter of which the court could not take judicial notice, it can not be taken into account here. But however this may be, *we are of the opinion that the city of Milwaukee can not, by creating a mere artificial and imaginary dock line, hundreds of feet away from the navigable part of the stream and without making the river navigable up to that line, deprive the riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose.*"

Mr. Justice Miller concludes his opinion in this case as follows:

"The decree of the circuit court is therefore reversed, with instructions to enter a decree enjoining the defendants below from interfering with plaintiff's wharf, reserving, however, the right of the city to remove or change it so far as may be necessary in the *actual* improvement of the navigability of the river, and *upon due compensation made.*"

Dutton *vs.* Strong, 1 Black, 25.

The Railroad Co. *vs.* Schurmeier, 7 Wall., 272.

Walker *vs.* Shepardson, 4 Wis., 486.

The legislature can not confer upon a municipality judicial powers. The city, in the absence of Congressional action, may establish a wharf line; and it may pass an ordinance with penalty for disobedience; if not obeyed, it can bring an action to enforce the penalty; the validity of the ordinance can then be tested. It may pass a law to provide for the punishment of any man who obstructs a highway, and providing for its abatement if it is *judicially* determined to be an obstruction, but it can not pass an ordinance declaring *as a fact* that Montgomery's wharf is an obstruction to a highway, which declaration is of itself *conclusive* of such alleged fact, and binding on Montgomery, for that would be an exercise of *judicial* power. That would be depriving a person of his property without a hearing, and *without due process of law.*

Bridge *vs.* Railroad Co., 3 Meerson & Welsby, 244
Davies *vs.* Mann, 10 *id.*, 546.
Mayor of Colchester *vs.* Brooke, 7 Q. B., 339.
Harrower *vs.* Ritson, 37 Barb., 301.
Yates *vs.* Milwaukee, 10 Wallace, 497.
14 amendment Const. U. S.
Art. 1, sec. 18, Const. Oregon.

It is not within the power of any State to declare that a public nuisance which is not so at common law, or which is not so *as a matter of fact.*

Cooley on Constitutional Limitations, 6 ed., 741, note.
Everett *vs.* Council Bluffs, 46 Iowa, 67.
Butchers' Union *vs.* Crescent City, 111 U. S., 746.
Railroad Co. *vs.* City of Joliet, 79 Ill., 44.

The question of a nuisance or obstruction must be determined by general and fixed laws, and it is not to be

tolerated that the local municipal authorities of a State can declare any particular business or structure a nuisance in such a summary mode and enforce its decision at its own pleasure.

Yates *vs.* Milwaukee, 10 Wallace, 498.

"Whether a nuisance or not," that is, a bridge or pier, "is a *question of fact;* and where they are confined to the shore, and no positive law or regulation was violated in their erection, the presumption is that they are not an obstruction, and he who alleges the contrary must prove it."

Dutton *vs.* Strong, 1 Black., 32.

Whether a particular use of private property constitutes a nuisance is a *judicial* and not a legislative question.

15 A. & E. Enc. of Law, 1178–1180 and note.

Milne *vs.* Davidson, 16 Am. Dec., 195.

Mr. Chief Justice Moore, in Grady *vs.* Dundon, 30 Oregon, 337, said:

"The power to appropriate private property to public use is derived from the Legislative Assembly, which may prescribe the mode of its exercise, and must provide a judicial tribunal for the determination of *certain facts* as a prerequisite to the exercise of such power. The legislature can not dispense with notice of some kind to the owner of the property affected, for to do so would be a violation of the fourteenth amendment to the Federal Constitution, and tantamount to a deprivation of property without due process of law."

Grady *vs.* Dundon, 30 Oregon, 337.

14th amendment to the Constitution of the United States.

2 Kent's Commentaries, 340.

Bridal Veil Lumbering Co. *vs.* Johnson, 30 Or., 205.

The supreme court of the State of Connecticut, in the case of West Hartford *vs.* Water Commissioners, 68 Connecticut, 323 (36 Atlantic Rep., 786), held that:

"The question whether an inhabitant of a town, desiring to obtain water, lives within a 'reasonable distance from the line of main pipes,' within the meaning of the statute requiring the board of water commissioners to furnish water to all residents of said town within that distance, *is a question for the courts to determine*, and the *decision of the board of commissioners is not conclusive or binding*."

The Supreme Court of Oregon, in Smith *vs.* Minto, 30 Oregon, 351, opinion by Mr. Justice Bean, in construing a clause in the present city charter of the city of Portland (Laws 1891, page 823, *et seq.*), held:

"That the power of the city council, in the matter of street improvements is a special one, and must be exercised in strict conformity with the authority conferred. Thus, where a city charter gives the council power to order a street improved *whenever it shall be unsafe*, the street must be *unsafe in fact*, or the improvement will not be binding on the property-owners. *The resolution of the council declaring the street dangerous is not conclusive on the courts.*"

Smith *vs.* Minto, 30 Oregon, 353.
2 Dillon on Munic. Corp., 4 ed., sec. 800.

The principle recognized by the foregoing authorities was adopted by that court in Grossman *vs.* City of Oakland, 30 Oregon, 478, opinion by Mr. Chief Justice Bean, who said (p. 483):

"The charter of the city confers upon it the power to prevent and restrain nuisances and to 'declare what shall constitute a nuisance.' But this does not authorize it to declare a particular use of property a nuisance, unless such use comes within the common law or statutory idea of nuisances." Quoting many authorities.

The court proceeding further says:

"By this provision of the charter the city is clothed with authority to declare by general ordinance under what circumstances and conditions certain acts or things injurious to health or dangerous to the public, are to constitute and be deemed nuisances, leaving the *question of fact* open for *judicial determination* as to whether a particular act or thing complained of comes within the prohibited class; *but it can not by ordinance arbitrarily declare any particular thing a nuisance which has not heretofore been so declared by law, or judicially determined to be such.* (City of Denver *vs.* Mullen, 7 Colorado, 345; 4 A. & E. Corp. Cases, 304; 3 Pac. 693."

Grossman *vs.* City of Oakland, 30 Oregon, 478.

Wharves and docks are as essential to the existence of foreign and interstate commerce, as are harbors and ships.

XXVI.

Mr. Justice Field, in his opinion in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., page 205, says:

"No foreign or interstate commerce can be carried on with the citizens of a State *without the use of a wharf*, or other place within its limits on which persons and freight may be landed and received, and the existence of a power in a State to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce, for the use of such places, would be inconsistent with and entirely subversive of the power vested in Congress over such commerce."

The Supreme Court of the United States in the case of Transportation Co. *vs.* Parkersburg, 107 U. S., 701, says:

"Wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river."

The court proceeding in the case, *supra*, Transportation Co. *vs.* Parkersburg, says:

"Now wharves, levees and landing places are *essential to commerce by water*, no less than a navigable channel and a clear river. But they are attached to the land; they are private property, real estate, and they are *primarily*, at least, subject to the local State laws. Congress has never yet interposed to supervise their administration. It has hitherto left this exclusively to the States. * * * When it shall have done so, it will be time enough for the court to carry its regulations into effect by judicial proceedings properly instituted. But, *until Congress has acted*, the courts of the United States cannot assume control over the subject as a matter of Federal cognizance. It is Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject.

"Wharves, quays, piers and landing places for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in the colonial times; and in point of fact the right to build such erections has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time."

This case was decided at the October term, 1882, long before Congress had taken jurisdiction of the subject.

Dutton *vs.* Strong, 1 Black., 33.

Angell on Tide Waters, 196.

In Dutton *vs.* Strong, 1 Black., 25, *supra*, the Supreme Court, in discussing the subject of the erection of wharves and docks, said:

"Wherever the water of the shore, so to speak, is too shallow to be navigable, there is the same necessity for such erections as in the bays and arms of the sea; and where that necessity exists it is difficult to see any reason

for denying to the adjacent owner the right to supply it; *but the right must be understood as terminating at the point of navigability*, where the necessity for such erections ordinarily ceases."

Again, in the case of Ouachita Packet Co. *vs.* Aiken, 121 U. S., 444, this court held that:

"Wharfage is, *in the absence of Federal legislation*, governed by local State laws." And further: "The case is clearly within the principles of former decisions of this court, which affirmed the right of the State, *in the absence of regulations by Congress*, to establish, maintain and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce. * * * Wharfage, the matter now under consideration, is governed by the local State laws. *No act of Congress has been passed to regulate it.*"

In every case decided by the Supreme Court of the United States, prior to the act of 1888, as amended September 19, 1890, taking jurisdiction of harbor lines in the navigable waters of the United States, the court in recognizing the authority of the State has *invariably* held that the National Government had not, at the date of such decisions, respectively, assumed any jurisdiction, and that therefore there was no question as to the right of the State to act. For instance, the court, speaking through Mr. Justice Bradley, in the case of Transportation Co. *vs.* Parkersburg, 107 U. S., 691, said:

"Although wharves are related to commerce and navigation as aids and conveniences, yet, being local in their nature and requiring special regulations at particular places, the jurisdiction and control thereof, *in the absence of congressional legislation on the subject*, properly belong to the States in which they are situated."

We readily concede, and in fact it is universally conceded by the profession, that a city may, if authorized by its charter, in the exercise of the police power of the

State, regulate and even absolutely inhibit the construction and use of any building or business whatever which affects the public health, the public morals, or the public safety.

As was said by the Supreme Court of the United States, speaking of the police power of a State, by Mr. Justice Brown in Lawton *vs.* Steele, 152 U. S., 136:

"Under this law it has been held that a State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars and habitual drunkards; the suppression of obscene publications and houses of ill fame; the prohibition of gambling houses and places were intoxicating liquors are sold."

All of these, it will be observed, come under the one or the other of the three heads, of the protection of the public health, public morals or the public safety.

But we concede there are certain other matters of legislation that come under the police power—that is, where the interests of the public are involved, and where measures are necessary for the protection of the public interests; but "to justify a State in thus interposing its authority in behalf of the public it must appear, *first*, that the interests of the *public generally*, as distinguished from those of a particular class, require such interference; and, *second*, that the means are *reasonable and necessary* for the accomplishment of the purpose, and not unduly oppressive upon individuals. And also that the

means resorted to *in nowise conflict with any Federal law or regulations.* The legislature can not, under pretense of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

In other words, its determination as to what is a proper exercise of the police power is *not final* or *conclusive*, but is subject to supervision by the courts.

Lawton *vs.* Steele, 152 U. S., 137.

The Supreme Court of the United States, in Lawton *vs.* Steele, 152 U. S., 137, in speaking further of the police power, and also as to the non-conclusiveness of the decision of the State as to what is a proper exercise of the police power, said:

"In other words, its determination as to what is a proper exercise of its police powers, *is not final or conclusive, but is subject to the supervision of the courts.* Thus an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the State against any expense for the support of the persons named for four years thereafter, was held by this court to be *indefensible* as an exercise of the police power, and to be *void* as interfering with the right of Congress to regulate commerce with foreign nations. Henderson *vs.* New York, 92 U. S., 259. A similar statute of California requiring a bond for certain classes of passengers described, among which were 'lewd and debauched women,' was held to show very clearly that the purpose was to extort money from a large class of passengers, or to prevent their immigration to California altogether, and was held to invade the right of Congress. Chy Lung *vs.* Freeman, 92 U. S., 275. So in Railroad Co. *vs.* Husen, 95 U. S., 465, a statute of Missouri which prohibited the driving of Texas, Mexican or Indian cattle into the State between certain dates in each year, was held to be in conflict with the commerce clause of the

Constitution, and not a legitimate exercise of the police powers of the State, though it was admitted that the State might for its self-protection prevent persons or animals having contagious diseases from entering its territory. In Rockwell *vs.* Nearing, 35 N. Y., 302, an act of the Legislature of New York which authorized the seizure and sale without judicial process of all animals found trespassing within private enclosures, was held to be obnoxious to the constitutional provision that no person should be deprived of his property without due process of law. See also Austin *vs.* Murray, 16 Pick., 121; Waterton *vs.* Mayo, 109 Mass., 315. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interest."

The first and second assignments of error in court below abandoned in brief and argument.

XXVII.

We take it for granted counsel do not insist on their first and second assignments of error in court below (Abstract of Record, 50) as no mention is made of either in the brief. We, therefore, have not discussed them, as we assume they are abandoned. They relate to the overruling by the court below of the demurrer and motion to strike out.

Neither the city nor port of Portland has, in any event, any right or jurisdiction to excavate, widen and change the location or capacity of the Portland harbor, unless the plan of such proposed work is first submitted to the Secretary of War, and the work has been approved and authorized by him.

XXVIII.

Counsel for appellants in the court below, it seems to us, have been rather disingenuous in their quotation from what they call the seventh (it should be the fourth) finding of fact, which states, among other things, that a copy of the act incorporating the port of Portland was transmitted by the president of said port to the then Secretary of War, etc. Counsel omitted a very important and qualifying portion of that finding. We refer now to their brief filed in the State supreme court. They may present the matter differently here. The quotation of counsel in their brief is as follows:

"Said finding further shows that 'soon after the passage of said act incorporating the port of Portland, a copy of the same was transmitted by the president of said port of Portland to the then Secretary of War, who approved the same; and that the work of the said port of Portland in improving the Columbia and Willamette rivers has been conducted in conjunction with the United States engineers in charge of said rivers, acting under instructions from the Secretary of War, and said engineers have annually reported to said Secretary the nature and extent of said work by said port of Portland." (Appellant's Brief, 27–28, Record 60.)

Counsel then make upon this finding of fact the following observation:

"We claim that this finding shows that all the juris-

diction and power of the State over the Willamette river, including the harbor of Portland, is vested in said corporation, the port of Portland, and that the Secretary of War has expressly consented that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment."

We now here give the whole of the fourth (erroneously designated as the seventh in appellants' brief in court below) finding of fact bearing upon that point, placing in *italics* that portion of it omitted by counsel for appellants in their statement as above:

"That soon after the passage of said act incoporating the port of Portland, a copy of the same was transmitted by the President of said port of Portland to the then Secretary of War, who approved the same, and that the work of the said port of Portland, in improving the Columbia and Willamette rivers, has been conducted in conjunction with the United States engineers in charge of said rivers, acting under instructions from the Secretary of War, and said engineers have annually reported to said Secretary the nature and extent of said work by said port of Portland. *But there is no evidence in the case showing or tending to show that any dredging or other work of any kind whatever in the improvement of said Willamette river has ever been done by the said port of Portland, on the inside or land side of the harbor line as relocated by the Secretary of War, September 23, 1898, or in the vicinity thereof, either above or below the same, nor that the Secretary of War has at any time suggested or recommended any such dredging or widening of the channel in that locality.*"

In their brief, page 28, counsel for appellants in referring to the act incorporating the port of Portland, section 3 of which is included in the findings, say:

"We claim that this finding shows that all the jurisdiction and power of the State over the Willamette river, including the harbor of Portland, is vested in said corporation, the Port of Portland, *and that the Secretary of*

War has expressly consented that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment."

We submit there is nothing in the record of this case which justifies the broad statement "that the Secretary of War has expressly consented that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment."

But suppose it is true! Where, we inquire of the learned counsel, does the Secretary of War get jurisdiction or authority to so "*expressly*" or even *inferentially*, consent, that the right to improve two among the largest navigable rivers in the United States—one of which separates two States of the Union for nearly four hundred miles, and the improvement of which has by Congress been *expressly* placed under his control—shall attach to a corporation organized under a State law of the State of Oregon? Surely here the argument *delegatus non potest delegare* applies.

It does not appear from anything in the bill of complaint in this case, or any finding of fact, or any evidence, that any plan of the proposed works for widening the Willamette river at the port of Portland, or for excavating so as to change or modify the course, location, condition or capacity of the channel of said harbor, has ever been submitted to the Secretary of War by the port of Portland, much less that the Secretary of War has ever approved or authorized such plan; and yet, it is provided in the latter clause of section 7, of the act of 1890, as amended by the act of July 13, 1892, Supplement to the Revised Statutes U. S., vol. 2, page 30, as follows:

"And it shall be unlawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and

abutments, causeway, *or other works* over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, *under any act of the Legislative Assembly of any State*, until the location and plan of such bridge or *other works* have been submitted to and approved by the Secretary of War, or *to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge*, or inclosure within the limits of any breakwater, *or of the channel of any navigable water of the United States*, unless approved and authorized by the Secretary of War."

In view of this section of the act of Congress can it be held that the port of Portland can commence "*to excavate*" or in any manner "to alter or modify the course, location, condition, or capacity of the channel of the navigable waters of the Willamette river at Portland, unless the "*location and plan*" of such proposed "*work*" or "*excavation*" is first submitted to the Secretary of War, and the same is "authorized and approved by him"?

The anomalous condition and character of shore bed and contour and bed of river in front of Montgomery's property demand change of location of harbor line in the public interest.

XXIX.

Counsel say in their brief, page 31 (Record, 61):

"Mr. Montgomery says that the change will save him some expense in dredging. But this is an argument that all the wharf owners in Portland might have made for a change in the harbor lines."

The answer to this is that the record in this case discloses the fact that the conditions, both as to depth of

water, character of formation of shore bed and bed of river in the vicinity where this line was changed, and the contour of the shore line, are wholly anomalous and different from most other places on either side of the river in the city of Portland.

First. It is an historical fact that the most of the wharves and docks located on the west side of the river within the city limits, and which are owned principally by persons who are opposing Mr. Montgomery, were built without any expense of dredging whatever, and into water from twenty-five to thirty feet in depth. In Mr. Montgomery's case it is altogether different. Chief Engineer Wilson, in his report to the Secretary of War (Abstract, 40) finds that the harbor line in front of Mr. Montgomery's property, as established August 9, 1892, runs across "*a bed of hard material which has defied the erosive power of the current during freshets*," and General Wilson says (Record, 9):

"In an engineering point of view, and in the interests of commerce, I cannot believe that any immediate and future material damage will result from granting his (Montgomery's) request." (Record, 9.)

And further, that the desired change will "avoid the expense of removing about 22,000 cubic yards." (Record, 9.)

Again, Hon. Henry Failing in his communication to General Wilson, Chief of Engineers, of date June 23, 1898, which letter is given in full hereafter, in referring to the harbor line in front of Mr. Montgomery's property established August 9, 1892, says:

"The line as established strikes across a point of land where the water is very shallow, and to reach deep water with warehouse and dock would entail a great expense

for dredging and blasting, a *large portion of the material being cement gravel.*" (Record, 155.)

But still further defendant in his answer, which is not denied by any replication, and therefore must be taken as true, says:

"The defendant avers that if restricted in the erection of his wharf to the harbor lines as established August 9, 1892, the cost of dredging, in order to obtain the necessary depth of water to enable ships to come to the wharf would be so enormous as to wholly prevent the improvement; that the bottom of the river, at, along and in front of defendant's said property consists in a great part of cement gravel, which would require blasting, and defendant avers, although permitted to construct his wharf up to the harbor line as established by the Secretary of War September 23, 1898, along which the water ranges in depth from *three to thirteen feet at one point*, the average depth of water along said line in front of the proposed wharf and warehouse *being not over five or six feet*, he will be compelled to spend a very large amount of money in dredging in the character of ground as stated, in order to enable ships of ordinary draught to come to his wharf at low water."

(Appellant's Abstract of Record, 24: Record, 9-10).

And further Major Fisk in his fourth objection in his report on the case to the Chief of Engineers, concedes the dredging difficulties in front of Mr. Montgomery's property. He says (Abstract, 39, Record, 9, also 38): * * * "Although the dredging at the place under discussion would probably *be in a material harder than in most other localities.*"

Reflections in brief of appellant's in court below, on General Wilson, Chief of Engineers, and Acting Secretary of War Meiklejohn, not warranted by the record.

XXX.

Counsel in their brief say (page 31; Record, 61.):

"He (Montgomery) takes the papers with some letters from his personal friends and goes to Washington. He applies to the Chief of Engineers, who overrules some of the objections of Major Fisk, but does not recommend the change. Mr. Meiklejohn, the acting Secretary (who perhaps never saw the Willamette river) without giving the city of Portland or the port of Portland, or the *chamber of commerce* any chance for a hearing, makes the change."

These statements assume, and counsel would have the court believe, that neither General John M. Wilson, Chief of Engineers of the U. S. Army, nor Hon. G. D. Meiklejohn, acting Secretary of War, considered and determined this controversy on the pleadings and evidence and the report sent up by Major Fisk, but that their decisions respectively were influenced and controlled by outside personal influence of Mr. Montgomery and his friends This is an unwarranted personal reflection, as unjust as it is untrue, on both General Wilson and Secretary Meiklejohn, and the well-known high character, both personally and officially of each of these gentlemen, is an altogether sufficient answer to this libellous innuendo.

The carefully prepared report of General Wilson to the Secretary (Abstract of Record, 38–41; Record, 37–39) discloses the fact that he gave careful consideration to Major Fisk's report, considering *seriatum* each of the ob-

jections, suggested by him, and concluded his report as follows:

"After a careful study of the subject I see no objection to granting this request, other than the establishment of a precedent upon which other applications hereafter may be based. This, in my opinion, is an important objection *for the consideration of the Secretary.*"

It will thus be seen that Chief Engineer Wilson, after considering each of the objections bearing *hydrographically* and *scientifically* upon Mr. Montgomery's application, overruled them all, giving specific, scientific and engineering reasons therefor, but left for the consideration and determination of the Secretary primarily and finally the *sole* objection, as to whether the establishment of a precedent, upon which other applications might be based, should prevail.

The statement of counsel that *Secretary Meiklejohn* "made the change without giving the city of Portland, or the port of Portland, or the chamber of commerce any chance for a hearing" is not altogether free from disingenuousness. General Wilson's report was submitted to the Secretary of War September 1, 1898. The case was pending before the Secretary *twenty-three days*, when on September 23, 1898, it was decided by acting Secretary Meiklejohn. The acting Secretary, moreover, was under no obligations by any law, rule or regulation, either legal or moral, to issue a notice to the defendants in error much less to the *chamber of commerce*, which was in no sense a party to the proceedings. The city of Portland and the port of Portland *were* notified, and appeared and were heard, before Major Fisk by written protests, objections and arguments, all of which were forwarded by Major Fisk to the Chief of Engineers, and by him considered and transmitted to the Secretary of War. If they desired to be heard further, before either the

Chief Engineer or the acting Secretary, either by way of further testimony, protest, arguments or otherwise, whose fault, we would inquire, but their own is it if they were not heard?

Counsels' Change of Base.

XXXI.

The weakness of the case of respondents is fully disclosed by the fact that counsel in their brief and argument before the supreme court of the State almost wholly changed their base and theory contended for in the circuit court.

In the printed brief and argument of counsel upon which this suit was commenced and argued in the circuit court, the *nervus probandi* relied on to sustain the jurisdiction of the State, and the action of the city and port of Portland thereunder, was, "inasmuch as the Willamette river is wholly within the State of Oregon, therefore, the State has *exclusive* jurisdiction." In that printed brief and argument counsel said:

"The Willamette river is exclusively within the State of Oregon. Numerous decisions have been made by the Supreme Court of the United States as to the jurisdiction of a State over the navigable waters exclusively within its lines."

And in order to sustain this proposition the following authorities were cited:

Wilson *vs.* Blackbird Creek Marsh. Co., 2 Peters' 242.

Withers *vs.* Buckly *et al.*, 20 How., 84.

The Willamette Iron Bridge Co., *vs.* Hatch, 125 U. S., 1.

The Passaic Bridges, 3 Wall., 782.

Gilman *vs.* Philadelphia, 3 Wall., 724.

Pound *vs.* Turk, 95 U. S., 459.
Huse *vs.* Glover, 119 U. S., 543.
Sands *vs.* Manistee River Imp. Co., 123 U. S., 288.

But in their printed brief in the Supreme Court of the State (Record, 44-62), this position seems to have been wholly abandoned, and not one of the authorities, *supra*, except the single case of Willamette Iron Bridge Co. *vs.* Hatch, is either cited or referred to. While on page 12 of their brief in the Supreme Court (Record, 51) counsel say:

"Counsel in the court below cited numerous cases, commencing with Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 251, and coming down to Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 203, to show that whenever and wherever Congress has establish regulations of commerce the State has no right to interfere."

The fact is, counsel for plaintiffs having cited the case of Wilson *vs.* Blackbird Creek Marsh Co., *supra*, as their first authority to sustain their proposition, *supra*, we cited, examined and discussed the case in our brief and argument in the court below, for the purpose of showing that the case, so far from sustaining the proposition of counsel for appellants in the State Supreme Court, was in full support of the theory claimed by us; and counsel for appellants have evidently become satisfied that this is so, for they have neither cited it, nor made any reference to it whatever, except as above, in their brief and argument in the Supreme Court.

Counsel in their brief, page 17, say:

"The State does not wish to prevent the construction of a wharf by Mr. Montgomery. All that it proposes to do is to regulate the size of his wharf, so that its river front shall conform to the other wharves in the city. We submit that this is a reasonable and just regulation." (Record, 54.)

The trouble, however with this effort upon the part of the State to make the river front of Montgomery's wharf conform to the other wharves in the city is that a higher power than the State, the National Government, has already done so.

Respondents are estopped from denying the jurisdiction of the Secretary of War to establish harbor lines.

XXXII.

It is respectfully submitted, respondents are by their pleadings estopped (paragraph III, bill of complaint) from insisting that the Secretary of War is without jurisdiction to establish the harbor lines in the Portland harbor. In the bill of complaint they make the following averment:

"On the ninth day of August, 1892, the *United States engineers* established wharf lines in the Willamette river within said city of Portland."

Bill of Complaint, paragraph III, abstract 2 (Record 16).

And further in paragraph IV, bill of complaint, abstract 2, they aver that "the city on December 12, 1892, established wharf lines in conformity to and coincident with the wharf lines *established by said United States engineers* as aforesaid.

And further, they aver in said bill of complaint, paragraph VII (Abstract 6) that the port of Portland on November 2, 1898, established and fixed wharf lines of the port of Portland on both sides of the Willamette river, "the same as that heretofore and prior to the first day of July, 1898, *established by the United States engineers.*"

It will be seen, therefore, defendants in error base their claim at the very outset on the *wharf lines established by*

the National Government. There is, moreover, no averment or claim in the bill of complaint to the effect that the Secretary of War was without jurisdiction or power to establish harbor lines.

A Legal Boomerang Proposition.

XXXIII.

Counsel insist all through their brief and argument (Brief, 25 and 29) that while the State may not have any jurisdiction on the *outside* of the harbor line established by the Secretary of War, that its jurisdiction *inside* such line is not open to dispute.

They further insist that the only true wharf lines, if any, ever established by the Secretary of War, or, as they term it, "*wharf lines established by the United States engineers*" (bill of complaint, paragraph III, Abstract 2), are those established August 9, 1892. Then they say in their brief, page 24:

"We admit for the sake of the argument that the State has no right to obstruct the river *outside* of the harbor lines fixed by the Secretary of War, but otherwise it has an absolute right to protect the channel and fix the dimensions of its harbor according to its own judgment." (Record, 58.)

If, then, the harbor line established by the Secretary of War August 9, 1892, is the only real harbor line established by him, and if, as contended by counsel, he had no right to change the same in September, 1898, then by what right can the city or the port of Portland interfere *outside*, or on the river side, of said line? They admit in their argument, as also in the bill of complaint, that the Secretary of War, through the United States engineers, established this line August 9, 1892. They admit they have no jurisdiction *outside*, or on the river side, of

said line, but only on the *inside*, or land side, of said line; and yet their only complaint of Mr. Montgomery is on account of what they allege he is doing on the *outside*, or river side, of said line, where they concede the State has no jurisdiction.

It is submitted this argument upon the part of counsel for the respondents involves what might be properly termed a compound *non sequitur*. We attract the attention of the court to the recent decision of this court in case of the Lake Shore and Michigan Southern Railroad Co. *vs.* State of Ohio; opinion by Mr. Justice Harlan, 173 U. S.

This case supports in several respects the views we have urged in this case.

A Recent Case Directly in Point.

The decision of the United States circuit court of appeals, opinion by Circuit Judge Jenkins, in the case of the People of Illinois *vs.* the Illinois Central Railroad Co., reported at page 955 of 91 Federal Reporter, is directly in point in support of our contentions.

In the case of Illinois *vs.* the Illinois Central Railroad Co., 146 U. S., 387, cited by counsel for appellants in the court below and hereinbefore referred to, the Supreme Court of the United States, after holding that a riparian owner on Lake Michigan had the right to maintain piers extending into the lake "*to a point of practical navigability*," directed the trial court by its mandate to determine whether piers previously built extended beyond such point "*having reference to the manner in which commerce in vessels is conducted on the lake.*"

The case came up on this mandate before the circuit court of appeals, seventh circuit, and was decided February 11, 1899.

91 Fed. Rep., 956.

This opinion of the court was delivered by Jenkins, circuit judge, who, in his opinion, says:

"We take it that the riparian right to penetrate the waters of the lake to a point of navigability, which is recognized by the decision of the Supreme Court in this case, *is not a right that is concluded and exhausted by the single exercise of it*, but that the owner has a right at all times to reach the point of practical navigability as it may exist from time to time. The pier that sufficed when the great lakes were navigated by vessels not exceeding one hundred and fifty tons burden would of course be wholly insufficient to meet the demands of commerce at this time, when the waters are ploughed by vessels of 4,000 tons burden and over. The right is a *relative* right, having relation, in the language of the Supreme Court in this cause, 'to the manner in which commerce in vessels is conducted on the lake.' To serve any useful purpose these piers must reach water of sufficient depth to float vessels when laden, and *alongside of which vessels can be conveniently brought to be loaded and unloaded*. A sufficient depth of water to float vessels such as navigate the waters of the lake is essential, and *is a necessary incident of the riparian right that the piers shall penetrate the water to a distance from the shore necessary to reach water which shall float vessels, the largest as well as the smallest*, that are engaged in the commerce of the lakes. Atlee *vs.* Packet Co., 21 Wall., 393; Langdon *vs.* Mayor, etc., 93 N. Y., 151."

Judge Jenkins, further in his opinion, quotes with approval the case of Atlee *vs.* Packet Co., 21 Wall., 393, in which the Supreme Court of the United States, speaking through Mr. Justice Miller, said:

"These structures, wharves, levees, piers and other landing places on navigable rivers, which are built and owned by individuals, and which are projected into the navigable channel of a river, are allowable in a part of the river which can be used for navigation, on the ground that they are *essential aids to navigation itself*. The navigable streams of the country would be of little value for that purpose if they had no places where the vessels

which they floated could land, with conveniences for receiving and discharging cargo, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. *Wharves and piers are as necessary almost to the successful use of the stream in navigation as the vessels themselves*, and are to be considered as an important part of the *instrumentalities of this branch of commerce*. But to be of any value in this respect they must reach *so far into deep water as to enable the vessels used in ordinary navigation to float while they touch them and are lashed to their sides*. They must of necessity occupy a part of the stream *over which a vessel could float if they were not there*."

Circuit Judge Jenkins, after quoting from the opinion of Chief Justice Ryan in 46 Wis., 244, further said:

"We think it must be, as stated by Chief Justice Ryan, that the extent of this riparian right is purely a relative question, and is limited only to the line of navigability upon a particular stream or body of water. That line of navigability is *a shifting line*; it is *one thing to-day and quite another thing to-morrow*."

This recent case in the circuit court of appeals, it will be seen, is directly in point, *first*, as to the duty of the Secretary of War under the act of Congress to change the harbor line whenever the circumstances seem to demand it, and, *second*, upon the right of the riparian proprietor to build out to deep water and meet the ships with his wharf.

The dockage and warehouse facilities of the port of Portland are inadequate to meet the demands of foreign and interstate commerce.

XXXIV.

This statement as to the shortage of dockage and warehouse room is supported by the record in this case.

We here give a copy of a communication from the late Honorable Henry Failing to General John M. Wilson, corps of engineers, U. S. Army, which speaks for itself. (Abstract of Record, 42.) This communication was before Major Fisk, General Wilson, and Secretary Meiklejohn when the case was being considered.

"FIRST NATIONAL BANK,
"PORTLAND, OREGON, *June* 23, 1898.

"General JOHN M. WILSON,
"Corps of Engineers, U. S. Army,
"Washington, D. C.

"SIR: I am informed that Mr. J. B. Montgomery of this city has petitioned for a relocation of the wharf line established in front of his property, and that of the Northern Pacific Terminal Company, leased and used by the O. R. R. & Navigation Company. The line as established, *strikes across a point of land where the water is very shallow," and to reach deep water with warehouse and dock would entail a great expense by dredging and blasting, a large portion of the material being cement gravel.* I am naturally opposed to any contraction of the waterway, which would affect the channel injuriously, and I therefore consulted Captain Cleveland Rockwell, who was for some years in charge of the survey here, and who is quite conversant with the river channel. I have not seen Captain Fisk about the matter, as I understand he has already made his report. I have great confidence in Captain Rockwell's knowledge and opinion concerning the matter, and he assures me that the change asked for will not injure the channel, and would be but justice to the owners affected.

"I have been much interested in the erection of *additional warehouse room for wheat storage, especially on the east side of the river*, where the product of the Columbia valley is received. As you may observe, the yield of wheat east of the Cascades has greatly increased, and the experience of last year *has demonstrated the great lack of storage room.* The present year promises a much larger export of grain than from the most abundant crop

of 1897–1898. The O. R. R. & Navigation Company *has been much hampered the past year, because of the lack of storage room, having at times hundreds of flat cars laden with wheat on their tracks* subject to damage, besides loss of use of flat cars. I have had several conversations with President Mohler of the O. R. R. & Navigation Company and other directors of the company, *concerning the necessity for providing further warehouse room, especially on the east side and below the bridges.* I regret that in the absence of Mr. Mohler I am not in possession of the statistics which he has laid before me from time to time, to show the *pressing necessity for more storage room.* It is my impression that Mr. Mohler told me that he had *for long periods over 300 cars of wheat on the track awaiting storage.* I presume the incoming crop will be 500,000 or 600,000 tons for export, and the greater portion of this grain must go into warehouse, pending the loading of ships. All this goes to show that *owners of wharf property ought not to be hampered in the erection of warehouses, and that the public interest is greatly involved.* I do not profess to have any skilled knowledge of the effect of change of line on the channel, but if not found to be injurious, it seems to me that the change asked for should be granted.

"Very respectfully yours,

"(Signed) HENRY FAILING."

This letter of Mr. Failing is concurred in by Mr. Mohler as follows:

"I fully concur with these statements.

A. H. MOHLER,
President O. R. R. & N. Co."

(Record, 192.)

The record also shows a letter, of which the following is a copy, addressed by Mr. Mohler to General Wilson:

"THE OREGON RAILROAD & NAVIGATION CO.,
"PORTLAND, OREGON, *August*, 19, 1898.

"Gen. John M. Wilson, Chief of Engineers, U. S. Army, Washington, D. C.

"GENERAL: I attach hereto a letter from our chief

engineer, Mr. W. H. Kennedy, who has been with this company and a resident of this State for many years.

"The question as to whether the extension of the harbor line is an encroachment or not is a *scientific* one; one which I am not personally able to pass upon. *The necessity for increased storage*, particularly on account of our increased interests in the Pacific Ocean countries, *makes it necessary to enlarge our facilities at this point and utilize all available space.*

"This company operates more ships on the Columbia river *than any other interest*, in fact more than any *two interests*, and it is, therefore, directly interested in not contracting the harbor line so as to interfere with free navigation.

"As I stated before, the question is a scientific one, and I assume Mr. Fisk, who has always been pleasant, courteous and considerate in his dealings with the people and corporate interests along the navigable waters of Oregon, somewhat hesitates to recommend a departure from the harbor lines which have been established by his predecessors.

"This company desires no personal advantage whatever; it is looking to the broader question of sufficient facilities, and if it is shown that the proposed harbor extension is detrimental and injurious, *which would certainly affect our property to a larger extent than others*, this company would not for a moment make the recommendation.

"Yours truly, A. H. MOHLER."

(Record 192—The six letters referred to in eighth sub-division of stipulation referred to on page 192 of record were by mistake omitted from the original printed record, they are, however, all in printed "addition to record," pages 8–14.)

But still further plaintiff in error, in his separate answer (Appellants' Abstract of Record, 23–24), makes the following averment:

"Defendant further avers that one of the purposes of the construction of the wharf by him is to erect thereon

a large and commodious warehouse for the storage of grain for shipment; that the *warehouse facilities for the port of Portland are wholly insufficient in number and capacity to meet the demands of the shippers.*"

(Record, 29.)

This averment is not denied by any replication, therefore, must be taken to be true.

The opinion and decision of the Supreme Court of the State of Oregon are obnoxious to just criticism.

XXXV.

This opinion at the outset concedes the contention of the plaintiff in error, that there is no averment in the complaint to the effect that the proposed extension of the wharf will be an obstruction to, or in any way interfere with the navigation of the river, or with any of the powers or duties of the port of Portland. (Opinion of the court; Record, 172.)

But it is contended by the court that this must be inferred *prima facie*, from the resolutions of the port of Portland forbidding its construction. This is a proposition it is respectfully submitted, which can not be sustained. It is submitted a State statute which confers on a municipality the power to establish dock and wharf lines, and to restrict encroachments, and to prevent obstructions to such stream, does not authorize it to declare, by special ordinance, a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, *when in point of fact it is not an obstruction nor a hindrance to navigation.* And a complaint demanding the removal of a wharf, which, as in this case, fails to aver such wharf is an interference with navigation, *is fatally defective.*

Yates *vs.* Milwaukee, 10 Wall., 498.

As stated heretofore in this brief, Mr. Justice Miller, in Yates *vs.* Milwaukee, *supra*, 504, said:

"The act of the Wisconsin legislature, approved March 31, 1854, confers upon the city of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee rivers, and restrain and prevent encroachments upon such rivers, and obstructions thereto. And it is by this statute that the summary proceedings for the removal of the appellant's wharf are supposed to be authorized. But the mere declaration of the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such a declaration make it a nuisance *unless it in fact had that character.*"

Mr. Justice Miller, proceeding further in his opinion in this case, said:

"It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself.

"It is true that it is said in the argument that the city council has established a wharf and dock line under the authority of the statute we have cited, and that Yates' dock projects beyond that line.

"No such defense is set up in the answer, and the existence of such a line, being a matter of which the court could not take judicial notice, it can not be taken into account here.

"But however this may be, we are of the opinion that the city of Milwaukee *can not, by creating a mere artificial and imaginary dock line hundreds of feet away from the navigated part of the stream, and without making the river navigable up to that line, deprive the riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose.*"

Mr. Justice Miller concludes his opinion in that case, as follows:

"The decree of the circuit court is therefore reversed with instructions to enter a decree enjoining the defendants below from interfering with the plaintiff's wharf, reserving, however, the right of the city to remove or change it so far as may be necessary, in the actual improvement of the navigability of the river, and upon *due compensation made.*"

Yates *vs.* Milwaukee, 10 Wall., 50.
Dutton *vs.* Strong, 1 Black, 25.
Railroad Company *vs.* Schurmier, 7 Wall., 272.
Walker *vs.* Sheperdson, 4 Wisconsin, 486.
Also, authorities heretofore cited in this brief.

For this reason alone, therefore, it is confidently contended the complaint in this case is fatally defective because of its failure to state facts sufficient to constitute a cause of suit.

But, further, because of undenied new material matter set up in the separate answer of Montgomery, judgment must be in favor of plaintiff in error, and this case should be reversed.

The court below in its opinion makes no note of any of the following facts, all of which *stand confessed in this case*, namely, that the separate answer of Montgomery in this case distinctly and positively avers as follows:

"FIRST. That the harbor lines as located across the property of this defendant by the action of the Secretary of War of August 9, 1892, *were practically on dry land at low water, there not being an average depth of as much as two feet of water along said line, the line running for over seven hundred feet distance in four, three, two and naught feet of water, and at one point on dry ground, at low water.*" (Defendant's answer, Record, 28); and,

SECOND. The answer of defendant Montgomery further avers as follows:

"Defendant avers that if restricted in the location of his wharf to the harbor lines as established August 9, 1892, the cost of dredging in order to obtain the necessary depth of water to enable ships to come to the wharf would be so enormous as to wholly prevent the improvement; that the bottom of the river at and along and in front of the defendant's said property *consists in a great part of cement gravel, which would require blasting;* and the defendant avers, although permitted to construct his wharf up to the harbor line as established by the Secretary of War September 23, 1898, along which the depth of water ranges from three to thirteen feet at one point, the average depth of water along said line in front of the proposed wharf and warehouse being *not over five or six feet*, he will still be compelled to spend a very large amount of money in dredging *in the character of ground as stated*, in order to enable ships of ordinary draft to come to his wharf at low water." (Answer of Montgomery, Record, 29); and

THIRD. The answer of the defendant Montgomery contains the following averment:

"And the defendant further avers that the construction of his said wharf at the place and in the manner he is constructing and intends to complete the same, does not in any respect curtail the navigable waters of the Willamette river at the city of Portland, nor is the same, nor will it be any obstruction to navigation, or to the work of the port of Portland, in making and maintaining a proper depth of water, in so far as the said port of Portland may have any rights in the premises. The defendant avers that the construction of such wharf as planned and being constructed by him, instead of being any injury to the commerce or navigation of the Willamette river at the port of Portland, will be a benefit to the same, and a valuable aid in the carrying on of foreign and interstate commerce at the said port of Portland." (Montgomery's answer, Record 29).

And further, the Court overlooks the fact that no replication was ever filed to this answer or any part of it, therefore, under the statutes of the State of Oregon, and the practice of the State circuit court in which this suit originated, all the *material averments* in the answer, *not denied in the reply*, are taken as admitted. This suit did not originate, it must be remembered, in a Federal, but in a State court.

The Oregon Statutes.

XXXVI.

The following provisions of the Oregon statutes govern in the matter of pleadings in cases at law and in equity, commenced in the circuit courts of that State:

SECTION 64. "The only pleadings on the part of the plaintiff shall be—

(1) The complaint,
(2) The demurrer, or
(3) The reply; and on the part of the defendant—
  (1) The demurrer; or
  (2) The answer."

(Hill's Annotated Laws of Oregon, Vol. 1, page 190.)

SECTION 77. "The plaintiff may demur to an answer containing new matter, when it appears upon the face thereof that such new matter does not constitute a defense or counter claim; or he may, for like cause, demur to one or more of such defenses or counter claims and reply to the residue."

Hill's Code, page 222, section 77.

"When the answer contains new matter, constituting a defense or counter claim, the plaintiff may reply to such new matter, denying specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in

ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer."

Sec. 76, Hill's Code, Vol. 1, page 221.

While section 78 of Hill's Code reads as follows:

"If the answer contain a statement of a new matter constituting a defense or counter claim, and the plaintiff fails to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages."

In this case the plaintiff in error insisted both in the circuit and supreme courts of the State on judgment on the pleadings for the reasons above stated.

Hill's Code, *supra*, page 223.

The foregoing provisions of the Oregon Code relate to actions at law, while section 389, Hill's Code, page 409, makes these several provisions applicable to suits in equity.

"If new matter is alleged in the answer a failure to reply will be taken as an admission of such new matter."

Schofield *vs.* State National Bank, 9th Neb., 316.
Creighton *vs.* Kellerman, 1st Disn., 548,
Ballanger *vs.* Lantier, 15th Kan., 608.

"The reply must be distinct and specific, so it may be seen clearly what is controverted."

Mattison *vs.* Smith, 19 A. B. B. P. R., 288.

It is clearly manifest, therefore, that for these reasons the defendant in the circuit court, and the plaintiff in error here, was and is entitled to a decree dismissing the bill.

It will be further observed, the court below wholly overlooked and ignored the very important fact that by

the express provisions of the act of the legislature of the State of Oregon (Section 4227, Hill's Annotated Laws of Oregon), Montgomery, as the owner of land lying upon the Willamette river, has the right to construct a wharf into such stream "*beyond low water mark, so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.*"

For the convenience of the court, section 4227, Hill's Code, *supra*, is given here in full:

"The owner of any land in this State lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, *and extend such wharf or wharves into such stream or other like water beyond low water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.*"

By section 4228 Hill's Code, following the above section, the corporate authorities of a town are hereby given power to "*prescribe the mode and extent to which the same may be exercised beyond the line of low water mark, so that such wharf or wharves shall not be constructed any further into such stream or other water beyond such low water line than may be necessary and convenient for the purpose expressed in section 4227, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water.*"

It will be seen, therefore, there is no power conferred by this section on the municipality to prevent the land owner from extending his wharf as far beyond such low water line as the municipality may fix as may be "*necessary and convenient for the purpose expressed in section 4227, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water.*"

What is the "purpose expressed in section 4227?" It is "*that the land owner has the right, in view of that fact, to extend his wharf or wharves into such stream beyond low water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.*"

Conceding, therefore, the constitutional power of the Secretary of War to fix and change from time to time as he may deem expedient and proper in the interest of foreign and interstate commerce, to establish harbor lines in the harbor at the city of Portland, there can be no serious doubt as to the right of Montgomery to construct a dock at the place and in the manner he is doing; but even conceding the unconstitutionality of section 12 of the river and harbor act, as contended by counsel, and the utter lack of power upon the part of the Secretary of War to establish harbor lines, even then, it is respectfully submitted, defendant Montgomery has a perfect right to construct his wharf at the place and in the manner it is being constructed, and this by virtue of section 4227 Hill's Code, *supra*; as it appears from the record in this case beyond all question, not only by the admitted facts, but by those which are proven, that the defendant Montgomery is constructing his wharf wholly within the provisions of the act of the legislature of Oregon, section 4227, hereinbefore cited.

XXXVII.

The court below, while indicating a leaning toward the unconstitutionality of the act of Congress of September 19, 1890 (26th Statutes at Large, 454, 455), authorizing the Secretary of War to establish harbor lines, hesitates to declare it such.

The court says:

"The question is important and interesting and has

been the occasion of considerable discussion in the Federal courts, although it has never been adjudicated by the Supreme Court of the United States. (United States *vs.* Keokuk & H. Bridge Co., 45 Fed., 178; United States *vs.* Rider, 50 Fed., 406; United States *vs.* City of Moline, 82 Fed., 592; United States *vs.* Romard, 89 Fed., 156.)" (Record, 175.)

And the court then remarks:

"The tendency of the decisions, as we read them, supports the argument that the act is void as an unlawful delegation of authority." (Opinion; Record, 175.)

It is true, I believe, as stated in the foregoing opinion, that the question "has never been adjudicated by the Supreme Court of the United States," but, it is respectfully submitted, the authorities quoted by the court, *supra*, do not justify the statement of the court to the effect that "*the tendency of the decisions supports the argument that the act is void as an unlawful delegation of authority.*"

It is respectfully submitted not one of the authorities quoted by Chief Justice Bean in his opinion, *supra*, gives any support whatever, not the remotest, to the contention that section 12 of the river and harbor act of September 19, 1890, is unconstitutional. I attract the attention of this court to the authorities cited by Chief Justice Bean.

As heretofore stated in this brief, the only question involved and passed upon in the case of the United States *vs.* Keokuk and H. Bridge Co., 45 Fed., 178, *supra*, was this: That where Congress has authorized the construction of a bridge over navigable waters of the United States, the same to be constructed according to certain plans, and a certain height, and with certain spans, and the same *has been so constructed*, that then a subsequent general act of Congress authorizing the Secretary of War

to declare bridges to be an obstruction to navigation, and authorizing him to direct a change in their construction, or their total removal, to be followed by a penalty after notice in case of refusal, cannot *apply to a bridge so previously constructed under a specific act of Congress.* The decision of the court in that case was *not* to the effect that the act of Congress of 1888, conferring these powers upon the Secretary of War, was unconstitutional, but was simply to the effect that the act did not apply to a case where a bridge *has been previously constructed* in strict accordance with plans and specifications authorized by a specific act of Congress.

Again, the case of the United States *vs.* Rider, next cited by the court below, is based wholly upon the case of the United States *vs.* Keokuk and H. Bridge Co., 50 Fed., *supra*, is in all respects a parallel case, except that the bridge in this latter case sought to be interfered with had been constructed previously by virtue of a grant from the State of Ohio under an act of the legislature of that State of March 25, 1870, the bridge being over the Muskingum river. The extent of the holdings in the two cases being simply that the authority conferred upon the Secretary of War did not authorize him to interfere with bridges *then legally constructed.*

The next case cited by the court below in their opinion, is that of the United States *vs.* the City of Moline, 82 Fed. 592, *supra*, and we confess to amazement that the court should cite this case in support of the unconstitutionality of the act referred to, from the fact that an examination of the case will show that the court, Judge Grosscup, held precisely to the contrary, that is, that the river and harbor act of September 19, 1890, conferring power and and imposing certain duties upon the Secretary of War, *is constitutional.* In that case, Judge Grosscup, after citing the case of the United States *vs.* Keokuk and H. Bridge Co., 45 Fed., *supra*, and also the case of the

United States *vs.* Rider, 50 Fed., *supra*, held that the river and harbor act of September 19, 1890, conferring power and imposing certain duties upon the Secretary of War, *is constitutional*.

The next and last case cited by the distinguished court below in support of the unconstitutionality of the river and harbor act referred to, is that of the United States *vs.* Romard, 89., 156; and again the decision in that case is in principle directly in support of the constitutionality of the act referred to, although the decision in that case did not involve the construction of the twelfth section of the act of September 19, 1890, but of the act of June 29, 1888, as amended by act of August, 1894.

In that case Congress, by the act of June 29, 1888, as amended by the act of August 18, 1894 (28 Stat. at Large) sought to prevent the deposit of destructive and injurious deposits within the tide-waters of the harbor of New York. Section one prohibits "the deposit of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets and sewers and passing therefrom in a liquid state in the tide waters of the harbor of New York * * *," while section 3 requires persons proposing to "take or tow such forbidden matter to a place of deposit, to apply for and obtain from the supervisor of the harbor, appointed hereunder, a permit defining the precise limits within which the discharge of such scows or boats may be made," and any deviation from such dumping or discharging place specified in such permit, is declared to be a misdemeanor within the meaning of the act.

Romard and others were indicted under this act for dumping at a place *other* than one of those prescribed in the permit issued by the supervisor of the harbor, and it was contended that while Congress had power to prescribe such limits, it could not authorize the supervisor

of the harbor to fix the same, for the reason, as is claimed in the case at bar, that that would be a delegation of legislative power. The court, however, held differently, and sustained the constitutionality of the act. It was insisted also in that case as in this case, that it fell within the principles enunciated in the case of the United States *vs.* Keokuk and H. Bridge Co., 45 Fed., 178, *supra*, but the court, after citing the opinion in the above case, said:

"In that case Congress had specifically authorized the Bridge Company to construct a bridge, and it did not appear that the construction was in violation of the terms of authorization, and the essential holding is that Congress can not delegate to a subordinate discretionary authority to nullify the act, and the construction of the bridge pursuant to it."

The court discussing the case further upon the question as to the power of Congress to confer such power upon the supervisor of the harbor said:

"Congress did not thereby delegate to the supervisor any of its power to "*relegate commerce*" and the including control of the navigable waters of the United States."

United States *vs.* Romard *et al.*, 89 Fed., 156.

These, therefore, are the four and only cases upon which the court below based the following remark:

"*The tendency of the decisions, as we read them, support the argument that the act is void as an unlawful delegation of authority.*"

We very much fear the distinguished Chief Justice of the Supreme Court of the State of Oregon has failed to read aright the several decisions so quoted by him in support of the above statement.

But the court below, after giving the twelfth section of the river and harbor act of September 19, 1890, this

pierce in the heart with the legal rapier, hesitates to kill it, because in this case, as the court below believes, it was unnecessary to a reversal of the decision of the Circuit Court. (Record, 175; Opinion of Court.)

And the decree of reversal is based solely on what seems to us a most narrow and untenable construction of the act authorizing the Secretary of War to establish harbor lines, and of a misconception as to the effect, in view of the commercial clause of the Constitution, and of the power of the Secretary of War to grant permission to a riparian owner to extend his wharf outside the established harbor line, of the establishment by the Federal Government, of harbor lines in the navigable waters of the United States. It is claimed by the court below that the only effect of the establishment of harbor lines by the Federal Government is to prevent any pier or wharf being constructed beyond or outside of it, *except by permission of the Secretary of War*. (Opinion of Court; Record, 175.)

While we confidently deny that any such narrow construction should be applied to the act in question, or that any act of the Secretary of War under it should be so limited and contracted in its operation, it is respectfully submitted that even under the construction given it by the court below, the decision of the court below can not be maintained, and the same should be reversed; and for the very good reason that the construction of a wharf by Montgomery at the place where it is being constructed, outside in part of the harbor line, as originally established August 9, 1892, is *by the express permission of the Secretary of War*. Conceding, therefore, the construction of the court below to be right, Montgomery is also right, as he comes within the plain provisions of the act authorizing the Secretary of War to give *permission to go beyond the established harbor line*.

(Sec. 7, Act Sept. 19, 1890; 25 Stats., 425.)

Montgomery had the express permission of the Secretary of War to construct his wharf outside of the harbor line as originally established August 9, 1892.

XXXVIII.

The court, by reference to the proceedings before the Secretary of War (Record, 6–11), must come to the conclusion that the very purpose, so expressed in the application, and in all of the proceedings upon the part of Montgomery, in his application to the Secretary of War, was *to enable him to construct his wharf beyond the harbor line as established August 9, 1892.* And the decision of the Chief of Engineers *first*; and then subsequently that of the Acting Secretary of War, were clearly and expressly to the effect *that he could be permitted to do so.*

By a reference to the report of John M. Wilson, Brigadier General, Chief of Engineers, U. S. Army, to the Secretary of War, September 1, 1898 (Record, 8), it will be found that he stated the purpose of the application as follows:

"This is a case of an application of Mr. James B. Montgomery of Portland, Oregon, for a change of the harbor lines at Portland, from those ordered by the Secretary of War August 9, 1892, *so as to admit of the construction of a dock the outer limit of the extreme point of which will be about 85 feet in advance of the present harbor lines.*" (Record, 8–9.)

Proceeding further, General Wilson says:

"The object of Mr. Montgomery, as stated by him, *is to avoid the necessity of the expense of dredging about 22,000 cubic yards of hard material.*" (Record, 8–9.)

General Wilson then takes up and answers the following objections made by the local engineer, namely:

4th. "As to give Mr. Montgomery privileges which others have not asked, through a jealous care of the best interests of the port, and even at considerable expense to themselves, it hardly seems fair, although the dredging at the place under discussion would probably *be in a material harder than in most other localities.*" (Record, 9.)

And, in answering this objection, says:

"The point made, that if this is granted it will be a special privilege not requested by others, is hardly a good one; if others had made similar applications they surely would have expected and demanded courteous consideration of their requests." (Record, 9.)

General Wilson then takes up the fifth objection suggested by the local engineer, which is as follows:

5th. "*The increase in the area of Mr. Montgomery's wharf* brings up the point that if one owner of water-front property is allowed such substantial advantages others might justly advance similar claims." (Record, 9.)

And, answering, says:

"This point," says General Wilson, "is important, and should be carefully considered. If other parties presented similar requests under similar conditions they would receive prompt consideration. In this case the *owner finds the harbor line running across a bed of hard material which has defied the erosive power of current during freshets. To avoid the expense of removing about 22,000 cubic yards, he asks that the harbor line be thrown forward about 85 feet at one point, running back to its original location at points about 700 feet distant on each side.* To comply with his request reduces the distance between harbor lines on opposite sides of the river to about 1,000 feet. Less than a mile above the river is only 600 feet wide, and is spanned by a bridge resting on piers. The slight contraction now asked *cannot throttle the freshets or do any material damage.*

"In an engineering point of view, and in the immediate of future interests of commerce, I cannot believe that any material damage will result from granting this request." (Record, 8–9.)

But not only so. Going back to the original application of James B. Montgomery for permission to construct his wharf beyond the harbor line as originally established, and for a change in said harbor line, as found by the court below (sixth finding of fact, Record, 6–7), which was the finding of the court, and which findings of facts are recognized as correct by the supreme court of the State, we will find the purpose of Montgomery in making the application to be as follows (we quote from the sixth finding of fact, Record, 6–7):

"That on or about May 21, 1898, the defendant, James B. Montgomery, presented his petition to the Secretary of War, in which he claimed that said harbor line, established August 9, 1892, in front of water lots 1, 2, 3, 4, 5, 6, and 7, was *located so far inland, and in many points in water only 6 inches to 2 feet in depth*, and praying that said line in front of said lots, and for a distance as hereinafter described, should be relocated. That the Secretary of War, on receipt of said application of defendant, James B. Montgomery, directed that a special hearing be had on the subject before Major W. L. Fisk, Corps of Engineers, U. S. A., at Portland, Oregon, with a view of ascertaining whether such change in said harbor line, as prayed for by defendant, and *whether his prayer for permission to extend his wharf beyond the harbor line established August 9, 1892, should be granted.*" (Record, 6–7.)

Based upon the opinion of General Wilson, Chief Engineer, U. S. A., on September 23, 1898, G. D. Meiklejohn, then Acting Secretary of War, took action thereon by the following endorsement of the papers in this case:

"WAR DEPARTMENT, *Sept. 23, 1898.*

In accordance with the view of the Chief of Engineers, the request of James B. Montgomery will be complied with.

G. D. MEIKLEJOHN."

(Record, 10.)

And also on the same day said Acting Secretary of War made the following endorsement upon the map accompanying Montgomery's application, and a copy of which is Exhibit "A" attached to Montgomery's answer (Record 26–27):

"WAR DEPARTMENT, *Sept.* 23, 1898.

"The change in the harbor line shown in red hereon is approved.

G. D. MEIKLEJOHN,
Acting Secretary of War."

(Record 10.)

The attention of the court is further called to the further findings of fact in this case as follows (Record 10–11.)

"The court finds that the red line referred to in the foregoing statement of the Acting Secretary of War is the identical line described in the application of the defendant Montgomery, for the change of the harbor line as amended by him at the request of Major Fisk, Corps of Engineers, U. S. A., August 17, 1898."

The eighth finding of fact is as follows:

"8th. That by the action of the Acting Secretary of War of September 23, 1898, aforesaid, the said harbor line was re-established and relocated by the Secretary of War, between Randolph and Russell street extended, on a line formed by an extension to an intersection in front of the defendant Montgomery's said property, of the harbor line established August 9, 1892, in front of the present Montgomery dock, and in front of the Northern Pacific Terminal Co.'s dock, as designated and described on said map Exhibit A, and by the red line thereon, that being the identical line described in the application of defendant Montgomery as amended August 17, 1898, in response to the written request of Major W. L. Fisk, Major, Corps Engineers, U. S. A., as aforesaid." (Record 10–11).

In view, therefore, of all the foregoing proceedings, can there be any question in the mind of this court, that the effect of this whole proceeding was to give to Mr. Montgomery *express permission* on the part of the Secretary of War to construct his wharf *beyond the line as originally established?* And if this is so, what becomes of the contention of counsel of the other side, or of the decision of the court below? And furthermore, can there be any doubt that the effect of these proceedings was to change the established harbor line from that fixed August 9, 1892, to the line as established by the Acting Secretary of War, September 23, 1898?

Counsel in the court below disputed the power of the Secretary of War to change or re-establish a harbor line after it has been once established. We have answered this contention fully heretofore. But in this connection we call the attention of the court to the fact that the court below seems to recognize the rightful relocation by the Secretary of War September 23, 1898. We quote from the opinion (Record, 176), as follows:

"The purpose of the city of Portland is not to interfere with the harbor line relocated by the Secretary of War September, 1898, but to prohibit the extension of wharves and piers beyond a certain line inside thereof. In our opinion, such power and authority still remain in the State, and Congress has not by the act of 1890 assumed to exercise exclusive control over the matter."

In other words, the holding of the Supreme Court of the State of Oregon amounts simply to this, although the change in the harbor line was made for the *express purpose* of permitting Montgomery to extend his wharf *beyond* the harbor line, as *originally established*, yet the State, through the municipality, can come in and say: "No, notwithstanding this was the purpose of this action upon the part of the Federal Government, we, the city, and the port of Portland, representing the State, propose

to nullify the action by declaring that the wharf shall *not* be extended as authorized by the Secretary of War." If this is not a direct conflict between Federal and State authority, in a matter affecting foreign commerce, then we confess we cannot imagine what would be a conflict.

But it is further respectfully submitted that the court below is in error as to the effect of the act of the Secretary of War, in establishing a harbor line in the navigable waters of a harbor located wholly within a State.

The court says:

"Congress has assumed jurisdiction over that point of a harbor outside of a line which the Secretary of War originally established, but it has not, in our opinion, assumed jurisdiction or authority over the space between such line and the shore, nor has it made any provisions directly or indirectly as to the use thereof."

And continuing, Chief Justice Bean says:

"While wharves, piers and landing places are essential to commerce by water, they are nevertheless, in their nature local, attached to the soil and require a diversity of rules and regulations. Full jurisdiction and control over them is vested in the State *in the absence of Congressional legislation upon the subject.*" (Record, 175.)

Most assuredly we concede the State's exclusive control over wharves, piers and landing places or other structures essential to commerce in the navigable waters of a river wholly within a State, *in the absence of Congressional legislation upon the subject.* But is it not a fact that we have legislation upon the subject in the case at bar? When the Federal Government has assumed control of a navigable water, even though the same be wholly within the limits of the State as in the case at bar, and after establishing a harbor line, and after providing not only in substance and effect, but *expressly*, that the Secretary of War may permit the extension of

piers and wharves and bulkheads, or other works *beyond such harbor line* so established, and *outside of the same*, it can not be successfully contended for one moment that there is, in reference to such harbor, an "*absence of Congressional legislation upon the subject*."

The court below proceeding further in the opinion referred to as to whether there has been Federal legislation, says:

"Such legislation can not, we think, be inferred from mere authority given to an executive officer to establish a line in a harbor beyond which it shall be unlawful to extend such structures without his consent." But when we recall the fact that section 7 of the river and harbor act of September 19, 1890, confers upon the Secretary of War power to authorize the construction of a wharf "*outside of an established harbor line*" (section 7, act of 1890, 26th statute, 444–445), it becomes no longer necessary to resort to *inference* as to whether there has or has not been such legislation. By this section, the whole question of the right of a property owner to extend his wharf beyond the harbor line established by the Secretary of War is vested *solely* in the Secretary of War, and the State has no longer any power in the premises. (Record, 175–176.)

Finally, the court below in support of its contention, says:

"This conclusion, we think, finds support in the Lake Shore and Michigan Railroad Company *vs.* Ohio, 165 U. S., 365." It is respectfully submitted, this case in 165 U. S., gives no support whatever to the views and conclusions of the court below, upon the contrary, the only question decided by the court in that case was that the provisions of sections 4, 5 and 7 of the act of September 19, 1892, conferring upon the Secretary of War authority concerning bridges over navigable waterways, do not deprive the States of authority to bridge such streams, but simply grant a remedy to prevent such structures,

although previously authorized, from interfering with commerce. With this decision we have no controversy whatever. As we have pointed out distinctly, heretofore, in this brief, a modicum of power in respect to the construction of bridges is distinctly left by Congressional legislation to the States respectively.

The public interests are vastly subserved by the construction of Montgomery's wharf and warehouse.

XXXIX.

We respectfully insist, in conclusion, that in view of the whole record in this case, the construction of the respondent's wharf and warehouse, at the place and in the manner he is constructing the same, so far from being an injury, is a *positive benefit to the harbor and to the commerce and shipping interests of the port.* There is a great shortage of warehouse room, as appears from the record, especially on the east side of the river (Record, 156–147), and Montgomery, so far from being characterized as sacrificing the public interests to satisfy his personal greed (Brief of Appellants, 32) should, for the public spirit he is manifesting by the expenditure of $50,000 or more, to enlarge and improve the warehouse and shipping facilities of the port, be commended as a public benefactor. The public interests are not promoted by restricting the wharfage and warehouse facilities of the port of Portland, and by centralizing the same in the hands and under the control of the few, and thus placing the shipping interests of the port at the mercy of a trust and, therefore, an unconscionable monopoly.

The public interests generally, and especially do the interests of *foreign* and *interstate* commerce, require adequate wharfage and warehouse accommodations, quite

as much as they do a deep channel and capacious harbor.

We respectfully insist the decree of the Supreme Court should be reversed, and that of the Circuit Court affirmed, with costs and disbursements.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

6179

No. 253. 47

Bx. of Williams & Wood for D.

Office Supreme Court U.S.
FILED
APR 14 1902
JAMES H. MCKENNEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

Filed April 14, 1902.

MARY PHELPS MONTGOMERY, Executrix of the last Will and Testament of JAMES B. MONTGOMERY, Deceased,
Plaintiff in Error,

v.

THE CITY OF PORTLAND, AND THE PORT OF PORTLAND,
Defendants in Error.

No. 253.

In Error to the Supreme Court of the State of Oregon.

Brief for Defendants in Error.

GEO. H. WILLIAMS, and
C. E. S. WOOD,
Attorneys for Defendants in Error.

PORTLAND, OREGON:
P. W. BAGNES AND COMPANY, PRINTERS, [illegible] OAK STREET.
1902.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

MARY PHELPS MONTGOMERY, Executrix of the last Will and Testament of JAMES B. MONTGOMERY, Deceased,
Plaintiff in Error,
v.
THE CITY OF PORTLAND, AND THE PORT OF PORTLAND,
Defendants in Error.
No. 253.

Brief for Defendants in Error.

POINTS AND AUTHORITIES.

I.

Sec. 12 of the Act of Congress of 1890 (27 Rev. Stats. 88) is unconstitutional.

Art. X, Amendments to the Constitution; United States v. Keokuk & H. Bridge Co., 45 Fed. Rep. 178; United States v. Rider, 50 Fed. Rep. 406; County of Mobile v. Kimball, 102 U. S. 699, 702; Gilman v. Philadelphia, 3 Wall. 725; Willamette Bridge Co. v. Hatch, 125 U. S. 1; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; United States v. Bailey, 1 McLean, 240; Mining Debris Cases, 9 Sawyer, 497.

II.

The Secretary of War had no right to change or relocate established harbor lines.

III.

The pleadings and evidence show affirmatively that the Secretary of War had no jurisdiction to change the established harbor lines of Portland.

Cooley Const. Lim., sect. 406, and cases cited; New Jersey R. R. & Tr. Co. v. Suydam, 17 N. J. L. 30.

IV.

Montgomery had no right to drive piles or extend his wharf beyond the wharf lines established by the City of Portland.

Lake Shore & Michigan R. R. Co. v. Ohio, 165 U. S. 365.

V.

To regulate the driving of piles or the building of wharves within the harbor of Portland is within the police powers of the city.

City of Dubuque v. Stone, 32 Iowa, 84; Beamen Case, 45 Fed. Rep. 129; Gray v. Frazier, 21 How. 187; Hunt v. Mayor, 9 Wend. 570; Vanderbilt v. Adams, 7 Cowen, 348; City of New York v. Milne, 11 Peters, 132, 138; License Cases, 5 How. 574; Cooley v. Wardens, 12 Wheat. 319; Crandall v. Nevada, 6 Wallace, 42; Munn v. Illinois, 94 U. S. 113; Thorpe v. R. R. Co., 27 Ver. 149; Boston & M. R. Co. v. Commissioners, 79 Maine, 386.

VI.

Said sect. 12 did not exclude the jurisdiction of the State inside the harbor lines fixed by the Secretary in 1898.

Veazie v. Moore, 14 How. 574.

VII.

Montgomery's right to build a wharf was subject to the provisions of sects. 4227 and 4228 of the Oregon Code.

Gould on Waters, sect. 179; Illinois Central R. R. Co. v. State, 146 U. S. 387; Commonwealth v. Alger, 61 Mass. 53.

VIII.

The decision of the Port of Portland is binding upon the plaintiff in error.

Amer. & Eng. Enc. of Law, p. 1046, and cases cited; Dillon on Mun. Corp., sects. 832, 836.

IX.

The Port of Portland has the right to regulate the driving of piles or the building of wharves inside of the harbor lines fixed by the Secretary in 1898.

People v. Williams, 64 Cal. 499.

ARGUMENT.

Sect. 8 of the Constitution of the United States confers upon Congress the power "to regulate commerce with foreign "nations and among the several states, and with the Indian "tribes." Sect. 12 of the Act of Congress of 1890 (27 Statutes, 88), under which the questions in this case arise, provides as follows:

"Where it is made manifest to the Secretary of War that "the establishment of harbor lines is essential to the preserva- "tion and protection of harbors, he may and is hereby au- "thorized to cause such lines to be established beyond which "no piers, wharves, bulkheads or other works shall be extended "or deposits made, except under such regulations as may be "prescribed from time to time by him; and any person who "shall wilfully violate the provisions of this section shall be "deemed guilty of a misdemeanor, and on conviction thereof "shall be punished by a fine not exceeding one thousand dol- "lars or imprisonment not exceeding one year, at the discre- "tion of the court, for such offense."

The charter of the City of Portland, Oregon, among other powers thereby conferred upon the Common Council of said city, provides that said Common Council "shall have power to "regulate the building of wharves and the driving of piles in "the Willamette and Columbia rivers within the limits of said "city and to establish a line beyond which wharves shall not be "built or piles driven," and said provision has been in force since February 19, 1891.

On the 9th day of August, 1892, a Board of United States Engineers surveyed wharf lines in the Willamette river within

the City of Portland; and on the 12th day of December, 1892, the Common Council duly passed an ordinance, No. 7995, by which the wharf lines so surveyed by said Board of Engineers were adopted and made the wharf lines of the City of Portland. Sect. 3 of said ordinance provides as follows: "All wharves "or other structures hereafter built or erected on the river "front on the east side of the Willamette river shall not extend "westerly beyond the line laid down in sect. 1 of this ordi- "nance; and all permits hereafter granted by the Common "Council for the driving of piles or erection of structures "shall conform to said line."

Said Common Council duly passed another ordinance, No. 9071, which provides: "Vessels arriving within the corporate "limits of the City of Portland, if obliged to anchor, shall be "anchored below the Albina ferry and on the west side of the "main channel."

At the time of the institution of this suit, J. B. Montgomery, the defendant, now represented by the plaintiff in error, was engaged in driving piles and constructing a wharf below and near the Albina ferry, which, if completed, would extend into the Willamette river within the harbor of Portland about eighty-five feet beyond the wharf lines established by said ordinance, and would occupy about 30,000 square feet of the river outside of said lines. He claimed the right to drive piles and construct his wharf in violation of said ordinance of the City of Portland, under and by virtue of certain proceedings in the War Department at Washington, which are fully set forth in the sixth and seventh findings of the state circuit court and the map attached to the answer.

I.

Our contention is that the Constitution does not confer upon Congress the right to delegate to the Secretary of War the power to establish harbor lines as provided in said section of the act of 1890. Article X of the Amendments to the Constitution provides: "The powers not *delegated* to the United "States by the Constitution, nor prohibited by it to the states, "are reserved to the states respectively, or to the people." Congress, therefore, in all of its acts of legislation, exercises a *delegated* power; and *delegatus non potest delegare* is a settled maxim of the law. Now, to fix the harbor lines of the ports of the United States is a regulation of commerce, or it is not. If it is, then the power so to do is exclusively vested in Congress. If it is not, then the City of Portland has an indisputable right to say where the wharf lines in its harbor shall be.

We do not deny that Congress may devolve upon an executive officer administrative or ministerial duties; but if the fixing of wharf lines in the harbor of Portland is a regulation of commerce, then it is as much a legislative function as the enactment of quarantine inspection and other laws of a like nature. To determine whether or not a harbor line "is essential to the "preservation and protection of a harbor" is certainly not a ministerial or executive duty, because it requires a deliberate judgment upon a variety of considerations which ordinarily enter into legislative action. Assuming the fixing of harbor lines to be a regulation of commerce, it necessarily follows that if this regulation of commerce can be ceded by Congress to the Secretary of War, all the other regulations of commerce can be in the same way transferred to him, and he, instead of Congress, become invested with the right to regulate commerce between the several states and with foreign nations.

We think the distinction between what is legislative and what is administrative is clearly defined by this court in Miller v. New York, 109 U. S. 385, in which the court says: "The "efficiency of an act as a declaration of legislative will, must "of course come from Congress; but the ascertainment of the "contingency upon which the act shall take effect may be left "to such agencies as it may designate."

In the case of the United States v. Keokuk & H. Bridge Co., 45 Fed. Rep. 178, it was decided that Congress had no power to confer upon the Secretary of War the right to change a bridge that had been erected with the consent of Congress. The court says: "Where, however, it becomes necessary to "decide whether the public interests demand that the naviga- "tion of a river shall be subjected to some burden and obstruc- "tion in order that the other public highways of the country "may be carried over the same by means of bridges, and to "prescribe the nature and extent of the obstruction that may "be caused to the navigation of the given waterway, *there are "presented legislative questions the decision of which cannot "be conferred upon any individual, citizen or subordinate au- "thority.*"

In United States v. Rider, 50 Fed. Rep. 106, the syllabus is as follows: "Act of Congress Aug. 11, 1888, 25 U. S. Stat- "utes, 424, providing that when the Secretary of War shall "have reason to believe that any bridge is an obstruction to "free navigation, he shall give notice requiring the bridge to "be so altered as to render navigation through or under it "easy and unobstructed, and imposing a penalty on the con- "trollers of the bridge for failing to make such provision, is

" unconstitutional in that it delegates to the Secretary of War " powers exclusively vested in Congress."

According to the decision of the courts and the practice of the government, Congress cannot delegate to the Secretary of War the authority to construct, according to his judgment, bridges over the navigable waters of the United States, though the details of their construction may be committed to him. The argument *ab inconvenienti* cannot avail the plaintiff in error, as this is purely a question as to the construction of the Constitution; but if the erection of bridges over the waters of a state can be safely left to the states, as it is by Congress, subject to the approval of the Secretary of War, why may not the establishment of wharf lines in waters exclusively within a state be safely left to the states, subject to the approval of the Secretary of War?

We cannot believe that the framers of the Constitution intended that the location and construction of wharves in the ports of New York, Baltimore and New Orleans and all the other commercial cities of the United States should be absolutely and exclusively in the hands of any individual official of the government.

Mr. Justice Swayne, delivering the opinion of the court, in Gilman v. Philadelphia, 3 Wallace, 726, says: "The power " to regulate commerce covers a wide field and embraces a " great variety of subjects. Some of these subjects call for " uniform rules and national legislation; others can be best " regulated by rules and provisions suggested by the varying " circumstances of different localities and limited in their oper- " ation to such localities. *To this extent the power to regulate " commerce may be exercised by the states.*"

Justice Field, referring to the above language, says, in County of Mobile v. Kimball, 102 U. S. 691: "This doctrine " was subsequently recognized in the case of Welten v. Mis- " souri, 91 U. S. 275, and Henderson v. Mayor, 92 U. S. 259, " and in numerous other cases; and it may be considered as " expressing the final judgment of this court."

We submit that the construction of wharves in the different harbors of the United States cannot, in the nature of things, be the subject of uniform rules; because the character of each wharf must be determined by the varying circumstances of the locality in which it is situated. This is a power that remains with the states, concurrently, at least, with the Federal government.

II.

Assuming for the purpose of this point that sect. 12 of the Act of 1890 is constitutional, we submit that by a fair construction of its language the Secretary of War is not empowered to change or relocate harbor lines that have once been duly and legally established. The language used is as follows: *"Where "it is made manifest to the Secretary* of War that the *estab-"lishment* of harbor lines is essential to the preservation and "protection of harbors, he may cause such lines to be estab-"lished," etc.

Does not the word "establishment" in this connection necessarily refer to an inceptive or original act? Does it not necessarily imply the absence of what is to be established? How can a thing be established that has been already established? Does not the language of this section clearly imply that there must be an existing necessity for action by the Secretary as to a harbor, arising out of the fact that such harbor is not protected by harbor lines? There was no such necessity as to the harbor in Portland, for that harbor has been preserved for many years, and fully protected by harbor lines established by the Secretary of War. The commerce of the country is broadening and new harbors are constantly coming into use; and it was as to such harbors the Secretary was empowered to act. Harbor lines were established long ago in New York, Boston, Baltimore and all our great commercial cities, and millions of dollars have been invested in wharves and warehouses with reference to these lines. Can it be supposed that Congress intended to confer upon the Secretary of War an unlimited discretion to change or relocate these lines? What was the mischief said sect. 12 was intended to prevent? Clearly, to protect a harbor that was not protected. One rule for the construction of a statute is that its meaning should not be extended beyond the mischief which it seeks to remedy or prevent. All the wharves in Portland, and they are many, conform to the harbor lines established by the Secretary of War in 1892; and it cannot be pretended that the relocation of these lines was necessary for the preservation or protection of the harbor.

III.

Assuming also, for the purposes of this point, that said sect. 12 is constitutional, we contend that the Secretary of War had no jurisdiction to relocate the harbor lines in the City

of Portland. Chief Justice Hornblower says, in New Jersey R. R. Co. v. Suydam, 17 N. J. L. 30: "The rule I apprehend " to be clear and well settled that persons exercising a special " delegated authority must show upon the face of their pro- " ceedings that they have acted within their prescribed limits." This is elementary law. Let us apply this law to the facts of this case.

Power is given to the Secretary of War to establish harbor lines where it is made manifest to him that such harbor lines are essential to the preservation and protection of a harbor. Whatever else may be said about said sect. 12, it is absolutely clear that the action of the Secretary under said section is to be governed by public considerations. Whenever a Secretary of War undertakes to set aside the action of his predecessor and override the laws of a state, there must be, to make his proceedings valid, an affirmative showing that he has acted within the prescribed limits of his authority.

Counsel will of course say that it is to be presumed that the Secretary acted within the limits of his power. But there can be no such presumption in this case, if there could be in any; for the entire record of the proceedings as to this matter is before the court, and it shows conclusively that the Secretary did not establish any harbor lines because they were essential to the protection of the Portland harbor. On the contrary, it shows that the established harbor lines were changed exclusively to subserve the personal and private interests of J. B. Montgomery. The seventh finding of fact clearly shows this. It says:

"This is a case of an application of Mr. J. B. Montgomery, " of Portland, Oregon, for a change of the harbor lines at " Portland from those ordered by the Secretary of War August " 9, 1892, so as to admit of the construction of a dock, the outer " limit of the extreme point of which will be about 85 feet in " advance of the present harbor line. The object of Mr. Mont- " gomery, as stated by him, is to avoid the necessity of the ex- " pense of dredging about 20,000 cubic yards of hard material."

The only reason given for changing the harbor lines of 1892 was to save Mr. Montgomery some expense in constructing his dock. There is no pretense or intimation that any public considerations influenced the Secretary. And where these facts affirmatively appear, can it be said that the Secretary of War had any jurisdiction to make a change in the harbor lines? Is it possible that under the Constitution and laws of the United States the Secretary of War can make or

change harbor lines to accommodate a personal or party friend?

Stress is laid upon the words, in said sect. 12, "except under "such regulations as may be prescribed by him from time to "time." Are the regulations here referred to regulations of commerce? If they are, then we insist that this part of said section is unconstitutional. To regulate commerce between the several states is a function of Congress that cannot be transferred or delegated to any individual. Regulation implies a rule, and an act of government. The regulations referred to are to be "prescribed." To *prescribe* means to write beforehand. The word *regulations*, as here used, evidently means rules for the management of harbors, to be written out and published before they take effect.

IV.

We submit with great confidence that the right of the City of Portland to regulate the driving of piles and the building of wharves inside of the harbor lines, as fixed by the Secretary of War, is affirmed in effect by this court in the case of Lake Shore & Michigan Railway v. Ohio, 165 U. S. 365.

On the trial of this cause in the state court, counsel for Montgomery cited numerous cases, commencing with Wilson v. Blackbird Creek Marsh Co., 2 Peters, 251, and coming down to Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 203, to show that whenever and wherever Congress has established regulations of commerce, a state has no right to interfere with these regulations. Now, it will be noticed that in these cases the court generally decided in favor of the claim set up under state authority, because there had been no legislation by Congress inconsistent with that authority; and, while what was said by the court as to the effect of future legislation by Congress is entitled to respectful consideration, it was all outside of the cases before the court, and clearly *obiter*.

Further, it will be noticed that the only case decided by this court since the Wilson case, 2 Peters, supra, as to the effect of such legislation after it has been enacted is the said case in 165 U. S. That case is as follows: The railroad company had constructed a bridge across the Ashtabula river, which empties into Lake Erie, without any draw; and the bridge was therefore an obstruction to the navigation of that river. The state court of Ohio issued a mandate to the railroad company, commanding it to remove the bridge or construct an adequate draw span therein. The railroad company took the same ground in

that case that the plaintiff in error takes in this; i. e., that the state had no jurisdiction over the subject, because Congress had taken exclusive control of the construction and alteration of bridges. This claim was predicated upon sect. 4 of the act of Congress, 26 Statutes, 453, which reads as follows: "Whenever the Secretary of War shall have good reason to "believe that any railroad or other *bridge now constructed* or "which may hereafter be constructed over any of the navigable "waterways of the United States is an unreasonable obstruc- "tion to the free navigation of such waters, on account of "insufficient height, width of span or otherwise, or where "there is difficulty in passing the draw opening or the draw "span of such bridge by rafts, steamboats, or other water craft, "it shall be the duty of the said Secretary, first giving the "parties reasonable opportunity to be heard, to give notice to "the persons or corporations owning or controlling such "bridge so to alter the same as to render navigation through "or under it reasonably free, easy and unobstructed; and in "giving such notice he shall specify the changes required to be "made and shall prescribe in each case a reasonable time in "which to make them. If at the end of such time the altera- "tion has not been made, the Secretary of War shall forthwith "notify the United States District Attorney for the district in "which such bridge is situated, to the end that the criminal "proceedings mentioned in the succeeding section may be "taken."

The court, in the case just cited (165 U. S. 365), says: "The contention is that the statute in question manifests the "purpose of Congress to deprive the several states of all au- "thority to control and regulate any and every structure over "all navigable streams, although they be wholly situated within "their territory. That full power resides in the states as to "the erection of bridges and other works in navigable streams "wholly within their jurisdiction, in the absence of the ex- "ercise by Congress of authority to the *contrary*, is conclu- "sively determined. Wilson v. Marsh Co., 2 Peters, 245; "Withers v. Buckley, 20 How. 84; Cardwell v. Bridge "Co., 113 U. S. 205; Bridge Co. v. Hatch, 125 U. S. 1; "Shively v. Bowlby, 152 U. S. 1, and authorities there "cited. Indeed, the argument at bar does not assail the rule "settled by the foregoing cases, but asserts that as the power "which it recognizes as existing in the states is predicated "solely upon the failure of Congress to exert its paramount "authority, therefore the rule no longer obtains, since the act "of 1890 relied on substantially amounts to an express assump-

"tion by Congress of entire control over all and every navi-
"gable stream, whether or not situated wholly within a state."

Now, this position of the railroad company, as stated by the court, and which was overruled, is precisely the position taken by the plaintiff in error in this case; namely, that the act of 1890 amounts to an express assumption by Congress of entire control over the Willamette river in Portland, to the exclusion of all state authority, as to the driving of piles or the construction of wharves. We submit that said sect. 4 is as much of an assumption of exclusive control over existing bridges as sect. 12 is over existing harbors.

The sum and substance of the argument on the other side is this: The State of Oregon had jurisdiction over the building of wharves in the harbor of Portland before Congress acted upon the subject; but Congress having acted by the act of 1890, the jurisdiction of the state is extinguished. We submit that this argument has been expressly overruled by the Ohio case, *supra*. Congress laid down the rule for the alteration of existing bridges. Notice was to be given, the parties were to have time, and the directions as to what was to be done were clear and specific; but the court held that all this did not exclude the jurisdiction of the state.

In the Ohio case, *supra*, this court further says: "The mere "delegation to the Secretary of the right to determine whether "a structure authorized by law has been so built as to impede "commerce, and to direct, when reasonably necessary, its modi-"fication, so as to remove such impediment, does not confer "upon that officer power to give original authority to build "bridges; nor does it presuppose that Congress conceived that "it was lodging in the Secretary power to that end."

Now, if sect. 4 does not give the Secretary the right to authorize the construction of a bridge, how can sect. 12 be construed to authorize the construction of a wharf? All of the sections of the act of 1890, taken together, show that the whole scope and spirit of the act is to prevent and remove obstructions to navigation. It may be that the power to do this can be conferred upon the Secretary of War; but any construction of said act which gives to the Secretary the power to originate acts for the construction of bridges, dams or wharves, or other structures of like nature, is not only contrary to the object of said act, but unconstitutional. The court will notice the doubt expressed upon this point in 165 U. S. 365. This court recognizes the jurisdiction and right of the state to prevent or remove obstructions from a navigable river wholly within its borders, and holds that congressional legislation for that pur-

pose is merely cumulative. That is to say, the jurisdictions of the state and the general government are concurrent. There is nothing extraordinary about this. They are concurrent as to pilotage, inspection, quarantine and other similar laws for the protection of ships, shippers and sailors. Congress has jurisdiction over railroads under the Interstate Commerce Act, and the states through which they run have also jurisdiction over the same roads.

Counsel for plaintiff in error, in a printed brief in the state circuit court, argues as follows: "I do not claim by any means, "nor is it necessary, at least as far as this case is concerned, "that Congress has any power under the commercial clause "to authorize the Secretary of War to determine as to the "size, length, height, or character of any wharf or warehouse "within the city of Portland constructed on lands bordering "on the Willamette river. My claim is this: that Congress "has the power under the commercial clause to authorize the "Secretary of War to establish, locate and fix a certain harbor "line on either side of the harbor at Portland, up to which "wharves, piers, warehouses and other commercial aids may "be constructed, and beyond which it shall not be lawful, "without the consent of Congress or the Secretary of War, "representing Congress, upon the part of the state or any cor- "poration or municipality authorized by the state, or any in- "dividual person, company, association or corporation, to con- "struct or build any wharf, pier or warehouse of any kind "whatever."

Now, if the Secretary of War has no authority to determine the size, length, height or character of this particular wharf, who has that authority? It seems to us that such authority must exist somewhere; and if not in the general government, it must be in the state. All that the state proposes to do in this case is to determine the length of the wharf.

Whatever else may be said of the foregoing argument of the eminent counsel, it is clear that it contains one palpable *non sequitur*, in its statement that wharves may be constructed up to the harbor line. This "may be" is not found in any law. On the contrary, such wharves are expressly prohibited by the law of the state. So that the argument is at once resolved into this,—Has the state a right to regulate the construction of wharves in the harbor of Portland? The state does not wish to prevent the construction of a wharf by the plaintiff in error. All that it proposes to do is to regulate the size of the wharf, so that its river front shall conform to the other wharves in

the city. We submit that this is a reasonable and just regulation.

In People v. Williams, 64 Cal. 499, the court says: "The "mere establishment of a harbor line does not deprive the "state of the right to regulate and control the navigable waters "within that line."

V.

We claim that the right to regulate the driving of piles in the Willamette river in the City of Portland is within the police power of the city. There must be a line somewhere separating the police power of a state from the power of the general government; and there must be some rights in the state which Congress is bound to respect. It must be admitted that there is a mass of powers which the states have not ceded to the general government; and among these are the police powers of the states. All that Montgomery took under the action of the Secretary, whatever it was, he took subject to these powers, if they apply to the case at bar.

The case of City of New York v. Milne, 11 Peters, 102, is instructive upon this point. Let us see, says this court, what powers are left to the states. "The Federalist, in the 45th "number, speaking of this subject, says the powers reserved "to the several states will extend to all objects which in the "ordinary course of affairs concern the lives, liberties and "properties of the people, and the internal order, improvement "and prosperity of the state." In the case of Gray v. Frazer, 21 How. 187, two ordinances of the City of Charleston, regulating the conduct of ships in its harbor, were attacked. The court says: "The power of the authorities to pass these ordi- "nances is disputed by libellants. But regulations of this kind "are necessary and indispensable in every commercial port for "the convenience and safety of commerce, and the local au- "thorities have a right to prescribe at what wharf a vessel may "lie and how long she may remain there, where she may un- "load or take on board particular cargoes, where she may "anchor in the harbor and for what time, and what descrip- "tion of light she shall display at night to warn passing ves- "sels of her position and that she is at anchor and not under "sail." Can there be any doubt that the City of Portland possesses all these powers?

In the case of Hart v. Mayor, 9 Wend. 570, it was held that an ordinance of the city of Albany to prevent obstruction

of the Hudson river by docks and slips, in said city, was within its police power.

In the case of The W. H. Beamen, 45 Fed. Rep. 129, the court says, as to a law of the State of New York requiring vessels to keep in the middle of the East River: "It is clearly "within the well-defined limits of the police power of the "state, and is valid and obligatory in its nature, as it is bene- "ficial in its character."

In the case of the City of Dubuque v. Stout, 32 Iowa, 84, the court says: "As in the case of public markets, the grant "of power to establish wharves and regulate the stationary "anchorage and moorings of all boats and rafts necessarily "confers the authority to fix the location and limits of the "wharves and landings and to prohibit the use of any other "place for that purpose." And the court further says: "Po- "lice regulations of this characters are uniformly held legal "and binding, because they are for the general benefit and do "not proceed to the length of impairing any private right. "The sovereign power in a community may prescribe the "manner of exercising individual rights over property. They "may prohibit the erection of wooden buildings, the keeping "of gunpowder and other dangerous combustibles for sale "within the city in greater than specified quantities, fix market "places and regulate the times when they shall be open, and "prohibit the sale of market produce at other places; and on "the same principles and for the same reasons may *establish "and regulate wharves and landings*, regulate the anchorage "of all boats, rafts or other vessels landing within its limits, "and, as a necessary incident to this power, may prohibit the "landing of such boats and rafts at any other place or places "than as prescribed in the ordinances or laws made for that "purpose."

Justice Field, in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, says: "The state may prescribe regulations "for the government of vessels while in its harbors; it may "provide for their anchorage or mooring so as to prevent "confusion and collision; it may designate the wharves at "which they shall discharge and receive their passengers and "cargoes, and require their removal from the wharves when "not thus engaged, so as to make room for other vessels. It "may appoint officers to see that the regulations are carried "out, and impose penalties for refusing to obey the directions "of such officers; and it may impose a tax upon vessels suf- "ficient to meet the expenses attendant upon the execution "of the regulations. The authority for establishing regula-

"tions of this character is found in the right and duty of the "supreme power of the state to provide for the safety, con- "venient use and undisturbed enjoyment of property within "its limits; and charges incurred in enforcing the regula- "tions may properly be considered as compensation for the "facilities thus furnished vessels. Vanderbilt v. Adams, 7 "Cow. 351."

But it is argued that the City of Portland has no right to establish harbor lines where such lines have been established by the Secretary of War. Admitting, for the sake of argument, that the city has no such right *co nomine*, that is not the question in this case. Harbor lines and wharf lines are not necessarily identical. Has the city a right to regulate the driving of piles or the construction and use of wharves in its harbor? The harbor lines established in 1892 by the Secretary of War were adopted by the Common Council of Portland as the wharf lines of the city as a matter of convenience and to save the expense of another survey. It is quite probable that the primary object in fixing a line beyond which piles should not be driven is to protect the channel and preserve a harbor wide enough for the commerce of the city; but there are many other reasons why the power to control the driving of piles should rest with the city authorities. The driving of piles in certain localities might interfere with the use of a ferry or bridge, or a street; or they might divert or shoal the channel or increase the danger to property in time of flood, or seriously damage public or private wharves; and many other reasons may exist why the city government should not be deprived of this power.

What we claim is that the State of Oregon can invest the City of Portland with the right of self-preservation; and that this right embraces the right to protect its harbor and commerce from destruction, as well as the health and morals of its inhabitants.

VI.

We deny that a limitation upon the driving of piles or the building of wharves by the city authorities in the harbor of Portland interferes with the regulation of commerce by the general government. Congress is not empowered by the Constitution to regulate commerce, but "to regulate commerce "with foreign nations and among the several states." Here is a restriction upon the power of Congress beyond which it cannot go.

Mr. Justice Daniel, in Veazie v. Moor, 14 How. 574, defines this power as follows: "The design and object of "that power, as evidenced in the history of the Constitution, "was to establish a perfect equality amongst the several "states as to commercial rights, and to prevent unjust and "invidious distinctions which local jealousies or local and "partial interests might be disposed to introduce and main-"tain."

How does an ordinance of the City of Portland, declaring that piles shall not be driven in the river outside of a certain line, disturb the equality of the states? Does such a line discriminate in favor of one and against another state? Incidentally, of course, wharves affect commerce; and so do warehouses, elevators, railroads, canals and all other public modes of travel and transportation, all of which are within the exclusive jurisdiction of the states in which they are situate, excepting in so far as they discriminate between the states or injuriously affect foreign commerce.

Portland says, in effect, to Mr. Montgomery, one of its citizens: "You shall not extend your wharf into the harbor "of the city any further than other citizens are allowed to "extend their wharves; you shall have the same rights that "other citizens have, and none other." What is there in this to interfere with the congressional power of regulating commerce between the several states and with foreign nations? What difference does it make whether a wharf extends into the river 50, 75 or 100 feet, so long as the vessels of all the states and all countries have exactly the same rights in the harbor and as to the use of such wharf?

In connection with this branch of our discussion, we ask the special attention of the court to the words, in said sect. 12,—"beyond which no piers, wharves, bulkheads or other works shall be extended," etc. Assuming that the line fixed by the Secretary in 1898 is the rightful harbor line, the prohibition is that no structure shall be put in the river outside of that line. There is no prohibition as to what shall or shall not be done inside of that line. On the contrary, the implication is that all inside of the line is left to the owner of the shore and the state. Our position is that the jurisdiction of the state inside of this line has not been taken away by Congress. Before this court will nullify a law of this state upon the ground that it has been abolished by act of Congress, it must be clear that the one is repugnant to the other. The language in 165 U. S. 365, *supra*, is this: "That full power "resides in the states as to the erection of bridges and other

"works in navigable streams wholly within their jurisdiction, "in the absence of the exercise of Congress of authority *to* "*the contrary*, is conclusively determined." Congress has not declared that the state may not regulate the driving of piles inside of the harbor lines established by the Secretary of War. Nor has it said, nor has the Secretary, that Mr. Montgomery *shall* build his wharf up to the red line on the map, which ruling would be necessary to overthrow the law of the state which says that *he shall not* build up to that line.

Giving to the act of the Secretary the most liberal construction, and calling it a permission to Mr. Montgomery to build his wharf up to the red line, does that amount to anything more than saying that the government is willing that he should extend his wharf to that line? Can Mr. Montgomery acquire a right, under such permission, to disregard the laws of the state in which he lives and in which the wharf is situated? There is no necessary conflict between the act of the Secretary and the ordinance of the city. They both aim at the same end. They are both intended to protect the harbor of Portland. We hold that the jurisdiction of the Secretary (if he has any) and the jurisdiction of the city over the entire harbor are concurrent. We admit, for the sake of the argument, that the city has no right to obstruct the river outside of the harbor lines fixed by the Secretary; but otherwise it has an absolute right to protect the channel of the river and fix the dimensions of its harbor according to its own judgment.

Does not the case in 165 U. S. clearly hold that if any one were to obstruct the river outside of the harbor lines, the state would have an equal right with the general government to remove the obstruction? We think that sect. 7 of the act of 1890, 26 Statutes, 426, shows the correctness of our contention. It reads as follows: "It shall not be lawful to build "any wharf, pier, dolphin, boom, dam, weir, breakwater, bulk-"head, jetty or structure of any kind *outside* established harbor "lines, or in any navigable waters of the United States where "no harbor lines are or may be established, without the per-"mission of the Secretary of War, in any port, roadstead, "haven, harbor, navigable river or other waters of the United "States, in such manner as shall obstruct or impair the navi-"gation, commerce or anchorage of such waters," etc., etc.

Now, we think that three things are clearly implied by this section:

1. That the prohibition is confined to the waters outside of harbor lines where harbor lines are established.

2. That no interference by the Secretary of War is contemplated as to state authorities or shore owners inside of said lines.

3. That states and individuals may do anything in navigable waters, inside or outside of harbor lines, or where there are no harbor lines, which does not "impair the navigation, "commerce or anchorage of such waters." We maintain, however, that the Secretary of War has no power, and cannot be invested with any power, to authorize the construction of a bridge, dam or wharf in any of the navigable waters of the United States, or to exercise any other power which amounts to a regulation of commerce between the several states. What the Secretary might or might not do in a case differing from this it is needless to inquire; but we deny that by his mere *ipse dixit* he can set aside the laws of a state. Such a power is dangerous, arbitrary and unconstitutional; and any state that will not stand up for its rights against the exercise of such a power ought to go into "innocuous desuetude."

VII.

The act of 1862, sections 4227 and 4228, Hill's Oregon Code, provides that "the owner of any land in this state, lying "upon any navigable stream or any like water and within the "corporate limits of any incorporated town therein, is hereby "authorized to construct a wharf or wharves upon the same "and extend such wharf or wharves into such stream or other "like water beyond low-water mark, so far as may be nec- "essary and convenient for the use and accommodation of any "ships or other boats or vessels that may or can navigate such "stream or other like water.

"Sect. 4228. The corporate authorities of the town "wherein such wharf or wharves is proposed to be constructed "shall have power to regulate the exercise of the privilege or "the franchise herein granted; and upon the application of "the person entitled to and desiring to construct such wharf "or wharves, such corporate authorities shall, by ordinance "or other like mode, prescribe the mode and line of low-water "mark, so that such wharf shall not be constructed any farther "into such stream or any water beyond such low-water line "than may be necessary and convenient for the purpose ex- "pressed in sect. 4227, and so that the same will not unneces- "sarily interfere with the navigation of such stream or other "like water."

Mr. Montgomery took his right to build his wharf sub-

ject to the provisions of this statute. There is no way that he can divest himself of its limitations, because they are part of the franchise granted. We do not believe that the Secretary of War can wipe this statute out of existence with one stroke of his pen, or that Congress intended that he should have any such power.

There is no inconsistency between this statute and said sect. 12 of the Act of Congress of 1890. They can both be carried into effect. Sect. 12 provides for a harbor line outside of which no obstructions shall be placed in the river. The state statute provides for a wharf line outside of which no wharf shall be erected. Harbor lines and wharf lines are or may be entirely distinct. Etymologically, a harbor is a place of shelter for ships where they may moor or ride at anchor. A wharf is a landing place for cargoes. Gould on Waters, sect. 179, in reference to the right of riparian owners to build wharves, piers, etc., says: "Its exercise may be regulated "or prohibited by the state; but so long as it is not prohibited, "it is a private right, derived from a passive or implied license "by the public."

Mr. Justice Field says, in the case of Illinois Central R. R. Co. v. The State, 146 U. S. 387, that a riparian proprietor holds his land "subject to such general rules and regulations "as the legislature may prescribe for the protection of the "rights of the public."

VIII.

The material parts of the act of the Oregon State Legislature incorporating the Port of Portland are contained in the fourth finding of fact. The purpose in creating the corporation was to make and maintain a ship channel at the City of Portland, and between that city and the sea, of good and sufficient width and having a depth at all points, at mean low water, both at said city and between said city and the sea, of not less than 25 feet. Sect. 3 of said act provides that, "so far as is necessary, requisite or convenient to carry out "the said object, the said corporation shall have the full con- "trol of said rivers at said cities and between said cities and "the sea, so far and to the full extent that this state can grant "the same, and shall be and is hereby authorized to remove "such obstructions therefrom and erect such works therein "as may be found necessary or convenient in creating and "maintainng the channel aforesaid."

Said finding farther says that "soon after the passage

"of said act incorporating the Port of Portland, a copy of "the same was transmitted by the president of said Port of "Portland to the then Secretary of War, who approved the "same; and that the work of the said Port of Portland in "improving the Columbia and Willamette rivers has been "conducted in conjunction with the United States engineers "in charge of said rivers, acting under instructions from the "Secretary of War, and said engineers have annually reported "to said Secretary the nature and extent of said work by said "Port of Portland."

We claim that these findings show that all the jurisdiction and power of the state over the Willamette river, including the harbor of Portland, is vested in said corporation, the Port of Portland, and that the Secretary of War has expressly consented that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment.

This court may take judicial notice, because it is a part of the public history of the state of Oregon, that this Port of Portland has expended more than six hundred thousand dollars in the improvement of the Columbia and Willamette rivers, — all with the co-operation of United States engineers acting under instructions from the Secretary of War. Congress no doubt might interfere by direct legislation; but we deny that the Secretary can now revoke his consent and authorize any one to build a bridge, dam or wharf in the Willamette river that will impede or impair the work of said Port of Portland. We say that after the work of the Port of Portland has been going on for eight years with the acquiescence of Congress, the consent of the Secretary of War, and the authority of the state, it has a right to prevent the erection of a pier, bulkhead, wharf or any other structure in the Willamette river that will obstruct its work in widening and deepening the channel of said river as contemplated by said act.

Let it be noticed that the Port of Portland does not propose to put anything in the river outside of the harbor lines. It only proposes to keep something out of the river inside of those lines. What reason can be given why it should not have this power, if in its judgment said something will prevent the improvement it is authorized to make? Can the court doubt that the Port of Portland has jurisdiction of that portion of the river which is within the harbor lines, to say nothing of what is outside of those lines? And if it has such jurisdic-

tion, has it not a right to *prevent* that which it has a right to *remove?*

Counsel for respondent, in a printed brief in the state court, says: "That the state had certain powers in the premises "I concede; and they are simply these, and no more. The "state could authorize the Port of Portland, as a municipal "corporation, to deepen and otherwise improve the navigation "of the waters of the Willamette river at the City of Portland, "and to determine what obstructions in said river it is neces- "sary or convenient to remove in order to make and protect "said channel within the harbor lines of such river at said "city as are caused to be established from time to time by the "Secretary of War, in virtue of the authority confered on "him by the River and Harbor Act of September 19, 1890."

We understand this to be an admission that the state, through the Port of Portland, has the right to deepen and otherwise improve the river between the harbor lines. If this is so, why has it not the power to deepen and otherwise improve the river between the harbor lines and the shore? On what principle or authority can it be said that the federal and state jurisdictions are concurrent outside and the federal jurisdiction exclusive inside of a harbor line? We think that if there is any exclusive jurisdiction inside of a harbor line, it is certainly in the state.

The Port of Portland decided that the construction of the wharf, as proposed by Mr. Montgomery, would shoal the navigable waters of the river and obstruct its work in making and widening a channel as required by its act of incorporation; and this decision was conclusive upon him and upon all the citizens of Oregon. It was a reasonable decision, because it conformed to the decision of the board of engineers in 1892 and also to the decision of Major Fisk, the U. S. engineer in charge of said river. And there is no appeal from it. It has the same force and is as binding as an act of the legislature to the same effect. The Port of Portland is a municipal corporation. Cook v. Port of Portland, 20 Oregon, 580. The law upon this subject is laid down in the Am. & Eng. Encyl. of Law, 1046, as follows: "The discretion of municipal corpora- "tions, within the sphere of their powers, is as wide as that "possessed by the government of a state. It is no more com- "petent for the judiciary to interfere with the legislative acts "of the one than the other. Where, therefore, municipal cor- "porations or their officers are acting within well recognized "powers, or exercising a discretionary power, the courts are "wholly unwarranted in interfering, unless fraud is shown or

" the power or discretion is being manifestly abused to the op-
' 'pression of the citizen." And a great number of authorities are cited in support of this doctrine.

Mr. Montgomery applies for a change in the harbor lines of Portland. Major Fisk, who is on the ground and can judge from personal observation, reports against the change, after a patient hearing. Mr. Montgomery takes the papers, with some letters from his personal friends, and goes to Washington. He applies to the Chief of Engineers, who overrules some of the objections of Major Fisk, but does not recommend the change. Mr. Meiklejohn, the Acting Secretary (who perhaps never saw the Willamette river), without giving the City of Portland or the Port of Portland or the Chamber of Commerce any chance for a hearing, makes the change.

Mr. Montgomery claimed that the change would save him some expense in dredging, but this is an argument that all of the wharf-owners in Portland might have made for a change in the harbor lines. He says that the harbor lines of 1892 ran through shallow water. This is true as to a low stage of water, but there is a considerable portion of the year when it is not true. But harbor lines are not established for a year or five years; they are intended to be permanent. They look to the future as well as the present.

Commercial men who do business in Portland know that its harbor is now too narrow for the convenience of shipping; and at no distant day all available space in the river must be utilized to meet the necessities of the situation. Portland is the great commercial emporium of the Northwest, and when the resources of this region are more largely developed and the trade with European and Asiatic countries is immensely increased, as it will be, its harbor, with all that can be done to increase its size, will be insufficient to accommodate that commerce. One object of organizing the Port of Portland was to dredge out and widen that harbor. But if one man can extend his wharf into the river to suit his interests, so can another; and thus the commercial welfare of the state will be sacrificed to the greed of individuals.

We submit that upon the law and facts of this case the decision of the Supreme Court of the State of Oregon should be sustained.

GEO. H. WILLIAMS, and
C. E. S. WOOD,
Attorneys for Defendants in Error.

618

No. 253. 47

Sup. Brf. of William Wood for D.C.

Office Supreme Court U.S.
FILED
APR 29 1902
JAMES H. McKENNEY
Clerk

In the Supreme Court of the United States.

Filed Apr. 29, 1902.

MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of James B. Montgomery, deceased,
Plaintiff in Error,

AGAINST

THE CITY OF PORTLAND and THE PORT OF PORTLAND,
Defendants in Error.

No. 253.

For the convenience of the Court, we have prepared the following statement of facts to be read with our brief:

The State of Oregon includes within its territorial limits the Willamette River, and the tide from the Pacific Ocean ebbs and flows up the Columbia River into the Willamette River, and within the limits of the City of Portland, to which point it is navigable for ocean vessels (Thirteenth Finding of Fact, Record, p. 42). In February, 1891, the State of Oregon, by legislative enactment, incorporated the City of Portland and conferred upon the Common Council of this municipal corporation the power to establish *wharf* lines in the Wilamette River, and to *prohibit the building of wharves beyond such lines* (First Finding of Fact, Record, p. 33). On February 18th, 1891, the State of Oregon created by another enactment a second municipal cor-

poration called the Port of Portland, and conferred upon a Board of Commissioners to be organized by the Port of Portland, the power to improve the Willamette River and maintain a ship channel between the Pacific Ocean and that portion of the Willamette River lying within the limits of the cities of Portland, Albina and East Portland, which two latter cities were afterwards merged in the City of Portland (Fourth Finding of Fact, Record, pp. 34, 35). On August 9th, 1892, the Secretary of War of the United States caused a harbor line to be established in the Willamette River within the limits of the City of Portland, beyond which no wharves could be extended except under regulations prescribed by him (Second Finding of Fact, Record, p. 33). On December 12th, 1892, the common council of the City of Portland *established a wharf line in the Willamette River within the limits of the City of Portland, which included the east side of this river and the property here in question and prohibited the construction of wharves beyond this line*, which line coincided with the harbor line previously established by the Secretary of War (Third Finding of Fact, Record, p. 33, and Fifth Finding of Fact, Record, p. 35).

Soon after the organization of the Port of Portland the President thereof transmitted to the Secretary of War a copy of the act of the Legislature of the State of Oregon, creating this municipal corporation and defining its powers, and received from the Secretary of War his approval thereof (Fourth Finding of Fact, Record, p. 34, and Addition to Record, p. 3). For a period of about six years after the establishment of the harbor line by the Secretary of War on August 9th, 1892, and the establishment, four months later, of a coinciding wharf line by the City of Portland, the Port of Portland, with the express approval of the Secretary of War, and according to plans prepared by the engineers of the United States Army in charge of river and harbor improvements at Portland, expended large sums of money in dredging, constructing dikes

and otherwise improving the river composing the harbor at Portland, and for which it was expressly understood that the United States Government incurred no expense or liability and all of which was annually reported to the Secretary of War by the engineers of the United States Army supervising said work from time to time (Fourth Finding of Fact, Record, p. 34, and Addition to Record, p. 5).

In 1898 one James B. Montgomery, an owner of a parcel of land in the City of Portland fronting on the Willamette River, petitioned the Secretary of War to relocate the harbor line, established in 1892, by placing it further out into the river, extending about eighty-five feet opposite the property owned by Montgomery (Sixth Finding of Fact, Record, pp. 35-37). The Secretary of War ordered a public hearing by Major W. L. Fiske, of the Engineers Corps of the United States Army, and the engineer in charge of river and harbor improvements at Portland, and such hearing was had, at which a number of the leading business men of the City of Portland were present. Opinions and protests were received, in writing, by Major Fiske, and his report was adverse to the requested change. This report was forwarded to the Chief of Engineers at Washington (Sixth Finding of Fact, Record, p. 36, Addition to Record, p. 11).

The objections to making the requested change were summarized by Major Fiske as follows:

First. The projecting angle in the proposed new harbor line would be likely to cause deposits below it, because it would necessarily check the current at that point during high water, the time at which sediment is carried.

Second. The reduction of the high water cross-section by the proposed change would have the slight choking effect on the floods, not of great importance, however.

Third. The reduction of the harbor area is an important objection, as it is in this portion of the river

that sea-going vessels anchor before docking and after loading, and are obliged to manœuvre both on arriving and departing, and no encroachment upon the already limited harbor should be permitted in view of the rapidly increasing commerce in this port.

FOURTH. It gives Mr. Montgomery privileges which others have not asked through a jealous care for the best interests of the port, and even at considerable expense to themselves, and it hardly seems fair, although the dredging at the place under discussion would probably be in a material harder than in most other localities.

FIFTH. The increase of the area of Mr. Montgomery's wharf brings up the point that, if one holder of water-front property is allowed such substantial advantages, others might justly advance similar claims (Seventh Finding of Fact, Record, pp. 37–8).

Brigadier General John W. Wilson, the then chief of Engineers of the Army, after considering these objections, concluded in his letter to the Secretary of War as follows:

"I see no objection to granting this request other than the establishment of a precedent upon which other applications may hereafter be based. This, in my opinion, is an important objection for the consideration of the Secretary of War" (Sixth Finding of Fact, Record, pp. 37, 38 and 39).

Subsequently, on September 23, 1898, Mr. G. D. Meiklejohn, as Acting Secretary of War, placed the following endorsement on the papers in the case. "Ninth Endorsement, War Department, September 23rd, 1898.

"In accordance with the views of the Chief of Engineers, the request of Mr. James B. Montgomery will be complied with.

G. D. MEIKLEJOHN,
Acting Secretary of War."
(Seventh Finding of Fact, Record, p. 39.)

In accordance with this endorsement, upon Mr. Montgomery's papers, applying for re-location of the said harbor line, Mr. Meiklejohn later, on the same day, made the following endorsement on a map, a copy of which is attached to the answer herein and is filed in this Court for consideration in the disposition of this case (Record, p. 191).

"WAR DEPARTMENT, September 23rd, 1898.

"The change in harbor line, shown in red hereon, is approved.

"G. D. MEIKLEJOHN,
"Acting Secretary of War."
(Seventh Finding of Fact, Record, p. 39.)

This change, so shown in red on said map, is the identical line described in Mr. Montgomery's amended application for a change of harbor line, presented to Major Fiske, United States Corps of Engineers, August 17th, 1898 (Sixth Finding of Fact, Record, p. 36).

This action by the acting Secretary of War purports to carve from the narrow harbor of Portland more than an acre of public harbor space, and to give to the plaintiff in error as a private concession to her nearly two-thirds of an acre of valuable wharf space (Seventh Finding of Fact, Record, pp. 37, 38). The object of Mr. Montgomery as stated by him in asking for the change in harbor line, and the only object stated or acted upon was, and is, to avoid the necessity and expense for him to dredge about 22,000 cubic yards of hard material (Seventh Finding of Fact, p. 37).

Without any further action by the Secretary of War, or by any one in that department, Montgomery commenced driving piles and constructing a wharf opposite the property owned by him, and within the limits of the City of Portland, extending from the shore beyond the harbor line established by the Secretary of War in 1892 and the coinciding wharf line established by the

City of Portland four months later (Ninth Finding of Fact, Record, p. 40). Whereupon the Port of Portland by resolution, duly passed, demanded of the said Montgomery that he cease driving piles and building his wharf beyond the wharf line established by the City of Portland in 1892 and harbor line established by the Secretary of War four months earlier, and upon Montgomery's refusal to comply with this resolution and demand of the Port of Portland, this suit was brought to restrain him in the premises. The Supreme Court of the State of Oregon decided adversely to the said Montgomery and restrained him from the construction of his wharf, and his testatrix, the plaintiff in error, has appealed to this Court (Ninth and Fifteenth Findings of Fact, pp. 40, 41 and 42).

GEORGE L. WILLIAMS,
C. E. S. WOOD and
THOMAS D. RAMBAUT,
Of Counsel.

Supreme Court of the United States.

No. 47.—October Term, 1902.

Mary Phelps Montgomery, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, Plaintiff in Error,
vs.
The City of Portland and the Port of Portland.

In error to the Supreme Court of the State of Oregon.

[May 18th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

This writ of error brings up for review the final decree in a suit instituted in one of the courts of Oregon by the City of Portland and Port of Portland against James B. Montgomery, who died during the progress of the cause, and was succeeded as defendant by his executrix, the present plaintiff in error.

The principal question in the case is whether, under the circumstances to be presently stated, Montgomery, as owner of land situated within the limits of Portland on the Willamette River, had the right to extend his wharves into the river beyond certain harbor lines established in 1892.

The City of Portland was authorized by its charter to regulate the building of wharves within its limits and to establish a line beyond which wharves should not be built nor piles driven. That provision was in force on and after February 19th 1891.

By an act of the Oregon Legislature of February 18th 1891 the inhabitants of the Port of Portland were created a corporation "to so improve the Willamette River at the cities of Portland, East Portland and Albina and the Willamette and Columbia Rivers between said cities and the sea as that there shall be made and permanently maintained in said Willamette River at said cities and in the said Willamette and Columbia Rivers, between said cities and the sea, a ship channel of good and sufficient width and having a depth at all points at mean low water, both at said cities and between said cities and the sea, of not less than twenty-five feet." And so far as was necessary to carry out that object, the corporation was given full control of those rivers at those cities and between them and the sea, to the full extent that the State could grant the same, and was authorized to remove such obstructions from them and erect such works in them as were found necessary or convenient in creating and maintaining the required channel. The power so conferred was to be exercised by a Board of Commissioners. Such a Board had been appointed and organized prior to the institution of this suit.

A copy of the act incorporating the Port of Portland was sent to the Secretary of War, "who approved the same," and the work done by that Port in improving the Willamette and Columbia Rivers was conducted in conjunction with the United States engineers in charge of those rivers, and who acted under instructions from the Secretary of War. The engineers annually reported to the Secretary the nature and amount of such work.

By the River and Harbor Act of July 13th 1892, amending the seventh section of the River and Harbor Act of September 19th 1890, it was provided:

"§ 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw-bridge, bridge piers and abutments or other works under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State." 26 *Stat.* 454; 27 *Stat.* 88, 110.

"§ 12. That section twelve* of the River and Harbor Act of August eleventh eighteen hundred and eighty-eight be amended and re-enacted so as to read as follows:

---

* "SEC. 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby, authorized to cause such lines to be established, beyond which no piers or wharves shall be extended or deposits made except under such regulations as may be prescribed from time to time by him." 25 *Stat.* 400, 425, c. 860.

"Where it is made manifest to the Secretary of War that the establishment of harbor-lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulk-heads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall willfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court, for each offense." 26 *Stat.* 426, 455.

On the 9th day of August 1892 the Secretary of War, proceeding—so the finding of facts states—under section twelve of the act of 1890, caused certain harbor lines to be established in the Willamette River within the limits of Portland. And by an ordinance adopted December 12th 1892 the Common Council of the city adopted as its wharf lines the harbor lines so established.

On or about May 21st 1898 Montgomery applied to the Secretary of War to have the above harbor lines relocated or located farther out in front of certain water lots belonging to him, his complaint being that, as established in 1892, those lines were too far inland. By order of the Secretary a public hearing was had on this application. A number of the leading business men of Portland attended and made protests against the proposed relocation. An account of this meeting, with all the papers relating to it, was sent to the Chief of Engineers, who made a report to the Secretary of War favorable to Montgomery's application. A map accompanied that report, showing the proposed new line. Under date of September 23d 1898, Mr. Meiklejohn, Acting Secretary of War, approved Montgomery's application and assented to the proposed change or relocation of the harbor line.

Having been notified by the local United States engineer that the War Department had approved the new line, Montgomery began the construction of a wharf by the driving of piles partly outside of the line of 1892 and in front of his lots, but wholly inside of the relocated line as indicated on the above map. He did not drive any piles or place any obstruction in the river outside of the relocated line.

On or about November 2d 1898 the Board of Commissioners of the Port took official action about the new line and Montgomery's construction of wharves beyond the line of 1892. They declared of record that the extension of wharves into the river outside of the line of 1892 would greatly damage the Port and its shipping interests, and they ordered Montgomery and those acting under him to cease the construction of any wharf beyond that line and at once to remove any piling or other

obstruction that he may have placed in the river in front of his property and beyond such wharf line. Subsequently, on November 23d 1898, the Port Commissioners took further action and declared that the wharf proposed by said Montgomery would interfere with the navigation of the river by creating shoal places in its now navigable waters and obstruct the work of making and maintaining a channel in the river twenty-five feet in depth, as provided for in the act incorporating the Port of Portland.

Of this action by the local authorities Montgomery and those in his employment were notified in writing.

The suit was brought to prevent the continuance of the work upon which Montgomery entered. The defendant resisted the relief asked and insisted that the action of the Secretary of War gave him complete authority to proceed despite any objections urged by the City and Port of Portland. The defense was sustained by a decree of the court of original jurisdiction and the bill was dismissed. But that decree was reversed by the Supreme Court of Oregon, its conclusions of law being: That the wharf lines established on the 12th day of December 1892 were then, and ever since have been, the legal and authorized wharf lines of the Port of Portland; and that the respondent had no right to drive piles or extend any wharf beyond the wharf lines so established. The respondent, her attorneys, agents, servants, and employes were by a final order enjoined from driving piles or putting any structure in the river outside of the wharf lines so established, and commanded to remove all piles driven or structures of any description erected therein, beyond said wharf lines. *Portland* v. *Montgomery*, 38 *Oregon*, 215.

This case cannot be distinguished in principle from *Cummings* v. *City of Chicago*, 189 *U. S.* , decided at the present term. In that case it appeared that the Secretary of War, proceeding under the act of September 19th 1890, and other legislation of Congress, had given his assent to the rebuilding of a certain dock in Calumet River, within the limits of Chicago; which river, being one of the navigable waters of the United States, had been surveyed by the direction of the Government, and for its improvement Congress had made appropriations from time to time. When that action was commenced there was in force an ordinance of the City of Chicago, enacted under the authority of the State, forbidding the construction of any pier, dock or other structure in navigable waters within the limits of that city without first obtaining a permit from its Department of Public Works. And the question was whether under the acts of Congress, including that of 1890, the above ordinance was of any avail as against the permit of the Secretary.

The contention of the plaintiff was that Congress, by its appropriations for the improvement of Calumet River, had taken such complete possession of that stream as to deprive the local authorities of all power in respect of the building or maintenance of structures in that river. In determining that question the court took into consideration various enactments, including the tenth section of the River and Harbor Act of March 3d 1899, c. 425, (passed after the present suit was brought,) as follows: "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." 30 *Stat.* 1121, 1151.

In that case we recognized the doctrine as long established that the authority of a State over navigable waters entirely within its limits was plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several States. After referring to *Lake Shore & Michigan Railway* v. *Ohio*, 165 *U. S.* 365, 366, 368, (1896), we said that if Congress had intended by its legislation, prior to that decision, "to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective States, and to supersede entirely the authority which the States, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the Government would have been manifested by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended. We do not overlook the long-settled principle that the power of Congress to regulate commerce among States 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons* v. *Ogden*, 9 *Wheat.* 1, 196; *Brown* v. *Maryland*, 12 *Wheat.* 419, 446; *Brown* v. *Houston*, 114 *U. S.* 630. But we will not at this time make any declaration of opinion as to the full scope of this power

or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several States. Whether Congress may, against or without the expressed will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the State Government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies."

There is nothing in the present case to distinguish it from the *Cummings* case. While section 12 of the act of 1890 forbade the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the Secretary of War, in navigable waters of the United States, "except under such regulations as may be prescribed from time to time by him," it does not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. Its general legislation so far means nothing more than that the regulations established by the Secretary in respect of waters, the navigation and commerce upon which may be regulated by Congress, shall not be disregarded even by the States. Congress has not, however, indicated its purpose to wholly ignore the original power of the States to regulate the use of navigable waters entirely within their respective limits. Upon the authority then of *Cummings* v. *City of Chicago*, and the cases therein cited—to which we may add *Willamette Bridge Co.* v. *Hatch*, 123 *U. S.* 1—we hold that, under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State, cannot be said to be complete and absolute without the concurrent or joint assent of both the General and State Governments. Of course, the right of the Government to erect public structures in a navigable water of the United States rests upon different grounds.

In this view it is unnecessary to consider the general question discussed at the bar whether Congress has or not, by some of its enactments relating to structures in navigable waters, committed to the Secretary of War the determination of matters that are legislative in their nature and which, under the Constitution, could only be determined, in the first instance, by

Congress. It is sufficient now to say that the legislation upon which the defendant relies to justify the construction of the works in question does not, when reasonably interpreted, indicate any purpose upon the part of Congress to assume such complete and absolute control of the navigable waters of the United States as will make of no avail the action of the States in respect of the erection by private parties of structures in waters wholly within their respective limits.

The judgment of the Supreme Court of Oregon is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.